

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 9, 2021

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1 (San Antonio, Texas; April 9, 2021, at 9:58 a.m., in open
2 court.)

3 THE COURT: Thank you. Please be seated.

4 Good morning, everyone. Let's continue with our trial.

5 I remind all counsel, parties, witnesses, participants,
6 and members of the public that this is a formal proceeding,
7 and that they should behave at all times as if they were
8 present in the courtroom.

9 The standing order of the San Antonio Division of the
10 Western District of Texas on remote access to court
11 proceedings remains in effect. Photography, recording, or
12 streaming of this proceeding by any means is strictly
13 prohibited. Though this proceeding is open to the public,
14 technological restraints require that members of the general
15 public request access from the courtroom deputy to participate
16 remotely.

17 Those granted approval to participate remotely must not
18 forward the electronic link to nonparticipating colleagues or
19 persons and must not post the link on any public forum. As
20 with all proceedings, violation of these instructions are
21 subject to contempt proceedings. Accordingly, please exercise
22 proper courtroom decorum at all times.

23 And with that, your next witness?

24 MR. JACOB: Yes, Your Honor. Plaintiffs call
25 Kimberly Del Greco.

1 *(Witness enters courtroom)*

2 THE CLERK: Please raise your right hand before you
3 sit down.

4 *(The oath was administered)*

5 THE CLERK: You can have a seat.

6 MR. JACOB: May I proceed, Your Honor?

7 THE COURT: Yes.

8 KIMBERLY DEL GRECO, WITNESS, SWORN

9 DIRECT EXAMINATION

10 BY MR. JACOB:

11 Q. Good morning, Ms. Del Greco.

12 A. Good morning.

13 Q. My name is Tom Jacob.

14 Would you mind introducing yourself to the Court, please.

15 A. Yes. My name is Kimberly Del Greco. I'm the deputy
16 assistant director for the FBI in Clarksburg, West Virginia,
17 for division -- it's the Criminal Justice Information Services
18 Division.

19 Q. And does that stand for CJIS?

20 A. Yes, CJIS.

21 Q. CJIS. Okay.

22 Ms. Del Greco, you're a representative of the FBI;
23 correct?

24 A. Yes.

25 Q. And you were actually hand-selected in this case to be the

1 representative of the FBI in this case; fair?

2 A. Yes.

3 Q. Did you know you've also been identified as a person with
4 knowledge about the facts of this case, surrounding this case?

5 A. Yes.

6 Q. And to be fair, you have the authority to speak on behalf
7 of the FBI today?

8 A. I do.

9 Q. Okay. And, Ms. Del Greco, would you mind just speaking up
10 just a little bit louder? I'm having a little bit of
11 difficulty hearing you.

12 A. Absolutely.

13 Q. Thank you.

14 Beyond being a representative of the FBI, you've been
15 working with the FBI for nearly all your career; is that fair?

16 A. Yes.

17 Q. Could you give us a little background into that, please?

18 A. Sure. I began in the government in 1990 with the
19 Department of Education, but only for five years, and then I
20 started with the FBI in 1995.

21 Q. Okay.

22 A. And I've been with them ever since.

23 Q. Are you familiar with the NICS section?

24 A. Yes. I -- when I started my position with the FBI, it was
25 to develop the NICS program.

1 Q. Okay. And how long have you worked in the NICS section?

2 A. The first time, eight years. And then I went back for a
3 couple more years.

4 Q. Have you had any leadership roles in the NICS section?

5 A. I did.

6 Q. Could you tell us a little bit about that, please?

7 A. Sure. I was a unit chief for NICS over their appeals and
8 their analytical staff. I became the assistant section chief,
9 and then I acted as the section chief for a year and a half
10 before I took a position as a section chief in the biometrics
11 section with CJIS.

12 Q. Okay. And before we get too far, could you tell us --
13 NICS is an interesting acronym.

14 Could you tell us what NICS stands for, please?

15 A. Absolutely. The National Instant Criminal Background
16 Check System -- Section.

17 Q. Okay. How many employees does NICS have?

18 A. Right now, about 700 employees and 130 contract staff.

19 Q. 2016, I think you told me they had roughly 450 to 500
20 employees; right?

21 A. They had 600. 400 were in the -- that's the staff that
22 processes the background checks. Yes. You're right.

23 Q. Okay. So you had 400 to 500 employees just processing
24 background checks at the NICS?

25 A. That's correct.

1 Q. Okay. Could you also tell the Court what an FFL is,
2 please?

3 A. Yes. That's a Federal Firearms Licensee. They are a gun
4 store owner that processes the firearm background check.

5 Q. Right. They actually contact the NICS section to do a
6 background check before selling a gun to a potential buyer;
7 right?

8 A. Yes, they do.

9 Q. Okay. And what I'd like to do is just give a little bit
10 more background. And I'd like to do that using Joint Exhibit
11 496. This has been admitted into evidence, and I'm going to
12 show you page 1 on your screen.

13 Do you see page 1?

14 A. I do.

15 Q. You've seen this document before; right?

16 A. Yes, I have.

17 Q. We went through it together in your deposition.

18 You remember that?

19 A. Yes.

20 Q. It just gives an overview of the NICS section; right?

21 A. It does, yes.

22 Q. Okay. Let me take you to page 5 of Joint Exhibit 496.

23 Do you see the map on your screen?

24 A. Yes.

25 Q. Could you tell the Court what this map shows?

1 A. It shows the state participation levels. The red
2 indicates a full point of contact state. Those states process
3 all of the firearm checks in their state.

4 The blue and yellow states are -- we call them partial
5 POCs. The state processes handgun checks, and we process the
6 long gun background checks.

7 And the green -- the green states are nonpoint of contact
8 states. And all of the FFLs in those states process their
9 checks directly to the FBI.

10 Q. Okay. And just to flesh that out a little bit, the red
11 states that are on this map on page 5 of 496 do still access
12 NICS data in order to process background checks; right?

13 A. Yes. That's correct. They run their background checks
14 through our system.

15 Q. Yes.

16 A. Yes.

17 Q. And for a state like Texas, they go directly to the FBI
18 when they need to run a background check; right?

19 A. Correct.

20 Q. Okay. Let me show you, then, page 7 of Joint Exhibit 496.
21 And do you see on your screen page 7?

22 A. I do, yes.

23 Q. And it says the types of records searched by the NICS
24 system; right?

25 A. Yes.

1 Q. And so we have a little background, we know that the NICS
2 searches, specifically, three databases; right?

3 A. That's correct.

4 Q. You have the Interstate Identification Index; yes?

5 A. Yes.

6 Q. And you call the III; right?

7 A. Correct.

8 Q. And then you have the National Crime Information Center;
9 right?

10 A. Correct.

11 Q. And that's known as the NCIC?

12 A. Correct.

13 Q. And then you have the NICS indices; correct?

14 A. That's correct.

15 Q. And on page 7 of this Joint 496, you kind of see some of
16 the records that are within each of these databases; right?

17 A. Yes.

18 Q. And I'd like to look at the NICS indices. NICS -- it
19 notes that the NICS indices contains convictions punishable by
20 an imprisonment for a term exceeding one year.

21 Do you see that?

22 A. Yes.

23 Q. Indictments for those same convictions?

24 A. Yes.

25 Q. You see it has mental health adjudications and

1 dishonorable discharges; right?

2 A. Yes.

3 Q. It also has convictions of misdemeanor crimes and domestic
4 violence; right?

5 A. That's correct.

6 Q. And these are Brady prohibitors?

7 A. They are.

8 Q. Right?

9 And tell us what a "Brady prohibitor" is, please.

10 A. There are ten Brady prohibitors identified under the Brady
11 law that, if held, prohibits someone from purchasing and
12 owning a firearm.

13 Q. Okay. So the NICS -- so a person goes into an FFL. They
14 want to buy a gun, and the FFL does a search with NICS in a --
15 in a point of contact state like Texas; right?

16 A. A nonpoint of contact state; correct.

17 Q. Yes.

18 A. They issue a search of our system.

19 Q. And the NICS automatically searches these three databases:
20 The III -- the III, the NCIC and the NICS indices; right?

21 A. That's correct.

22 Q. If there's information in the NICS indices of a Brady
23 prohibitor, that's an automatic denial, isn't it?

24 MR. STERN: Objection. Leading.

25 THE COURT: Sustained.

1 MR. JACOB: Your Honor, this is an adverse party
2 witness.

3 MR. STERN: They called her as a witness, Your Honor.

4 THE COURT: Let's just avoid the leading.

5 BY MR. JACOB:

6 Q. Ma'am, if the NICS -- if there is a Brady prohibiter on
7 the -- in the NICS indices, would that be an automatic denial?

8 A. Yes.

9 Q. Let me show you -- well, let's talk a little bit about the
10 FFLs going to -- through the NICS background search system
11 real quick.

12 When an FFL needs to do a search and they do a search
13 through the NICS system, the NICS provides three responses;
14 correct?

15 A. Can you repeat that question again?

16 Q. Yeah.

17 When an FFL does a background gun check through NICS, what
18 are the responses that NICS can provide?

19 A. So we only provide one response to the FFL. It could
20 either be a proceed, and that means the sale may proceed -- or
21 the transaction may proceed. The dealer makes the decision
22 whether to actually sell the gun. It may be a denial. That
23 means NICS found something prohibiting in the record and
24 denied the transaction to the dealer. Or it could be a delay,
25 and that indicates that there's additional research that is

1 needed and a NICS transaction number, or NTN, is also provided
2 to the FFL.

3 Q. Okay. If NICS has a record of a felony conviction, that's
4 a conviction punishable by more than a year in prison, would
5 that be an instant denial?

6 A. It depends. If there's additional research that is needed
7 on that felony -- it's up to the individual examiner when
8 they're looking at it, and their training, to make that
9 decision. Potentially, if it's a clean record and the final
10 disposition indicates a felony, yes, they could deny.

11 Q. Ms. Del Greco, has that always been your testimony?

12 A. Has that -- say that again. State that again, please.

13 Q. Sure.

14 Has that response to my question: If a NICS -- if a
15 record of a felony conviction punishable by more than a year
16 in prison is provided, that's an instant denial?

17 Do you remember that question?

18 A. It can be. Yes, sir.

19 Q. Okay. And NICS also has a previously denied persons file;
20 right?

21 A. Yes. It's in the NCIC, yes.

22 Q. Right.

23 So if you're a FFL that does a search and it comes back as
24 denied, NICS puts that person in the previously denied persons
25 file; right?

1 A. That is a file -- yes. It's a file accessible --
2 accessible by state and local law enforcement.

3 Q. And a previously denied persons file is also an instant
4 denial for future -- for future purchases; right?

5 A. It would be a record that would be accessible to NICS;
6 correct.

7 Q. And it would be an instant denial; isn't that fair?

8 MR. STERN: Objection. Leading.

9 THE COURT: That's overruled.

10 THE WITNESS: It can be. You know, it depends on the
11 specific record and the examiner that's making that
12 determination. But, yes, it can be.

13 BY MR. JACOB:

14 Q. Okay. Ms. Del Greco, I want to show you a document that
15 has been preadmitted, Plaintiffs' Exhibit PEX 797. And you
16 should see that on your screen pretty soon here. And I'll
17 show you the first page of 797.

18 You recognize -- do you recognize Plaintiffs' Exhibit 797?

19 A. Yes, I do.

20 Q. Can you identify Plaintiffs' Exhibit 797, please?

21 A. This is a document that's given out to agencies. It
22 highlights the various disqualifiers under the Brady law, and
23 it also highlights in the document how agencies can submit
24 records to the NICS.

25 Q. It provides another overview of the NICS operations in

1 2016; right?

2 A. Yes.

3 Q. And this is a document that the FBI publishes on a yearly
4 basis; right?

5 A. We do.

6 Q. And so you can actually go to the CJIS website and pull
7 every single year up to 2019? I believe that's the most
8 recent year.

9 A. Yes. That's correct.

10 Q. Okay. Let me show you page 2 of Exhibit 797.

11 Do you see that on your screen?

12 A. I do.

13 Q. And I know it's a little small font, so I want to bring --
14 call out the message from the NICS section chief.

15 Do you see that?

16 A. Yes.

17 Q. And if you scroll down to the bottom of that document, can
18 you tell me who the author of this message from the NICS
19 section chief is?

20 A. Yes. It's Kimberly J. Del Greco.

21 Q. Okay. And I want to call out the third full paragraph of
22 PEX 797, page 2.

23 And do you see the last sentence of this paragraph?

24 A. Yes.

25 Q. And I'll just highlight it for you. And when you get --

1 when you see the highlight, would you read that sentence to
2 the Court, please?

3 A. Sure. "Being able to view valuable information in a
4 timely manner aided the NICS section to ensure public safety
5 by denying 120,497 firearm background checks in 2016."

6 Q. Isn't it fair to say that denying firearm checks to felons
7 and child abusers aids the NICS sections in ensuring public
8 safety?

9 A. It does.

10 Q. And this is actually the mission of the NICS; isn't it?

11 A. It is.

12 Q. Let me show you page 4 of PEX 797. And I want to call out
13 the -- specifically, the NICS section mission. This is the
14 FBI's NICS section mission that you're seeing on your screen;
15 right?

16 A. Yes.

17 Q. It's a lot of words there.

18 Would you mind reading the mission of the -- of the NICS
19 section to the Court, please?

20 A. Sure. "The mission of the NICS section is to enhance
21 national security and public safety by providing timely and
22 accurate determination of a person's eligibility to both
23 possess firearms and/or explosives in accordance with federal
24 law."

25 Q. Okay. So for the rest of the conversation, what I'd like

1 to do with you is talk to you a little bit about how the NICS
2 provides both timely and accurate information. Okay?

3 A. Okay.

4 Q. So one at a time. Let's start with the timeliness aspect.
5 Okay.

6 A. Yes.

7 Q. And you know that the NICS -- well, actually, let me --
8 let me ask it this way.

9 There -- what are the two ways that -- that in 2016 an FFL
10 could run a NICS background search?

11 A. Yes. So a NICS -- an FFL can either call our contracted
12 call center in Barbourville, Kentucky, and provide the
13 biographics from the 4473 to a call center employee, which
14 runs the transaction against our system, or an FFL can process
15 a background check through E-Check, and it's an electric
16 mechanism.

17 Q. And I believe a call gets a response within less than 20
18 seconds; right?

19 A. It does.

20 Q. And electronic checks are even faster than that; right?

21 A. They are, sir.

22 Q. By an order of three to one?

23 A. Correct.

24 Q. So for every call that the NICS gets, you can process an
25 electronic check in -- you can process three electronic

1 checks; right?

2 A. That's correct.

3 Q. Okay. Let me show you page 19 of PEX 797.

4 And could you tell the Court what an "immediate
5 determination rate" is?

6 A. It's an immediate proceed or denial to an FFL from a NICS
7 search.

8 Q. Is it fair to say that, throughout the history of the NICS
9 section, the NICS section has strove to meet this 90-percent
10 immediate determination rate?

11 A. We have, yes.

12 Q. And what does it mean have a 90-percent immediate
13 determination rate?

14 A. For the NICS section, it's important to provide service to
15 the FFL. We know that's their business. And we also want
16 people that do not have a prohibiting record, or ones that do,
17 have an immediate response within the three days.

18 Q. Right.

19 So an immediate response is either proceed or deny; right?

20 A. That's correct.

21 Q. And in 90 percent of the cases, the NICS provides either a
22 proceed or deny?

23 A. That's correct.

24 Q. Okay. So we talked a little bit about the timeliness
25 aspect, how fast the NICS system is. I want to talk about how

1 y'all get an accurate proceed or deny. Okay?

2 A. Yes.

3 Q. And to do that, I need to show you -- and I want to talk
4 to you in particular about the Devin Kelley case. And so I
5 need to show you some documents from the Devin Kelley case.
6 And these are all documents that you should have seen before.

7 Let me pull out Joint Exhibit 658, page 199. And I want
8 to compare it to Joint Exhibit 658, page 369.

9 Do you see those two documents on your screens?

10 A. I do, sir.

11 Q. Could you tell the Court first what page 199, the document
12 on your left, is?

13 A. That's a fingerprint card, a manual fingerprint card.

14 Q. And it's a fingerprint card for Devin Kelley; do you see
15 that?

16 A. Yes.

17 Q. Okay. And could you tell us what the document on the
18 right, page 369, is?

19 A. It's a ATF Form 4473 that Devin Kelley filled out.

20 Q. Okay. And I want to look at the identifying biographical
21 features that are provided in each of these cards.

22 Do you see that, between the fingerprint card and the FFL,
23 Devin Kelley -- his name matches; right?

24 A. Yes.

25 Q. Does his height -- or does his gender match?

1 A. Yes.

2 Q. Does his date of birth match?

3 A. Yes, it does.

4 Q. And does his Social Security match?

5 A. Yes, it does.

6 Q. All right. At least on this portion of the ATF form,
7 Devin Kelley told the truth about his identifying
8 characteristics; is that a fair assessment?

9 A. He did.

10 Q. Okay. I want to show you the next page of the ATF form.
11 And that is Page 370 -- 371, actually. Let me show you that.
12 And I'm going to call out the first half of this form for you
13 so you can see it. It's a little blurry.

14 And you can see page 371 of Exhibit 658 is the ATF form
15 that Devin Kelley filled out to get his Ruger AR. Do you see
16 that?

17 A. I do.

18 Q. And do you see the date on this form, 4/7/2016?

19 A. Yes.

20 Q. Ms. Del Greco, isn't it true that if before April 7, 2016,
21 a final disposition had been submitted to the FBI CJIS with
22 Devin Kelley's conviction of a felony, the FBI would have
23 denied that transaction?

24 MR. STERN: Objection. Leading.

25 THE COURT: Overruled.

1 THE WITNESS: Yes.

2 BY MR. JACOB:

3 Q. But the FBI didn't have the information it needed in order
4 to run the background search on Devin Kelley; did it?

5 A. We did not.

6 Q. And at no point did either the DoD or the Air Force
7 correct that missing information; did it?

8 A. No.

9 Q. Ms. Del Greco, I want to show you JEX 658, page 202 and
10 203. Can you tell the Court what pages 202 and 203 are?

11 A. This is the -- what we term as the R-84 form. And it's a
12 request for final disposition.

13 Q. All right. It is a green form that should have the final
14 disposition information of a convicted offender; right?

15 A. It should, yes.

16 Q. And I'll represent to you this, pages 202 and 203, are
17 copies of the final disposition form that was found in Devin
18 Kelley's Air Force file.

19 You know that these final disposition forms come with a
20 self-addressed envelope; right?

21 A. Yes, I do.

22 Q. All right. And were you aware that the Air Force had not
23 even filled out Devin Kelley's final disposition form?

24 A. I am.

25 Q. Okay. Let me talk to you about the consequences of the

1 Air Force's failure to fill out this form and submit it to the
2 FBI. And I'll do that by showing you JEX 658, page 375. And
3 I want to call out that first section so you can see it a
4 little bit better.

5 Can you tell us what we're looking at on page 375?

6 A. This is a response to a NICS E-Check transaction providing
7 the NTN number, NICS transaction number, the date and the time
8 of the transaction, and the proceed response.

9 Q. Okay. Specifically, it's a response to Devin Kelley's
10 E-Check or a NICS check on 4/7/2016; right?

11 A. Yes.

12 Q. And the response at that time was "proceed"; right?

13 A. That's correct.

14 Q. And it was based on the information you had; right?

15 A. Correct.

16 Q. But it -- but you didn't have the information of his
17 felony conviction; right?

18 A. Correct.

19 Q. Ms. Del Greco, I want to talk to you -- keeping along the
20 theme of this -- the consequence of this failure, I'm going to
21 show you what we have premarked as Plaintiffs' Demonstrative
22 Exhibit B.

23 Can you see Plaintiffs' Demonstrative Exhibit B okay?

24 A. Yeah.

25 Q. I can try to reposition it.

1 A. No, I can. Farther to the left, I cannot.

2 Q. And I'm just going to be talking about this section, so it
3 may be a little bit easier for us.

4 Ms. Del Greco, you're aware that on December 12th, 2014,
5 Devin Kelley purchased a Glock; right?

6 A. Correct.

7 Q. And you know now that should have been a denial; right?

8 A. Correct.

9 Q. And if this was a denial, so should his June 26, 2015
10 purchase; right?

11 A. Yes.

12 Q. And if that was a denial, so should the April 7th, 2016
13 purchase; fair?

14 A. Yes.

15 Q. And if his April 7, 2016 purchase of an AR was a denial,
16 so should his October 18th, 2017 purchase of the Ruger?

17 A. Correct.

18 Q. Okay. But it's not just guns that -- preventing felons
19 from acquiring guns that protects public safety; is it?

20 A. Correct.

21 Q. The NICS section is actually used by the law enforcement
22 agencies to help protect public safety; isn't it?

23 MR. STERN: Objection. Leading and mischaracterizes
24 prior testimony.

25 THE COURT: That's overruled.

1 THE WITNESS: I'm not sure -- the question, when you
2 say "use" --

3 BY MR. JACOB:

4 Q. Well, the information in some of the NICS databases, the
5 III and the NCIC, are used by law enforcement agencies across
6 the country to help them close their cases; right?

7 A. So I wouldn't categorize that as a NICS database. III and
8 NCIC, National Crime Information Center, are separate
9 repositories at the FBI.

10 Q. Sure.

11 But, nevertheless, those databases are used by law
12 enforcement agents across the country to help protect the
13 public, right?

14 A. Correct. Separate from NICS. They do not have access to
15 NICS.

16 Q. Okay. Well, if Devin Kelley's information had been
17 submitted, I want to talk -- we've talked with Ranger Snyder,
18 a Texas Ranger, about some of the background checks that were
19 done on Devin Kelley through his employment and through other
20 law enforcement agents that came back clean. And you may not
21 be aware of that. But there's one particular background check
22 I want to talk to you about.

23 And it is this background check on July 14th, 2014 [sic].
24 Were you aware that a roommate of Devin Kelley's had reported
25 Kelley as a child abuser?

1 A. No.

2 Q. And they reported Kelley to the Colorado Springs Police
3 Department.

4 Were you aware of that?

5 A. I don't believe I am.

6 THE COURT: One second.

7 MR. STERN: She just answered.

8 THE WITNESS: I'm sorry.

9 MR. STERN: No. Please.

10 THE COURT: You may continue.

11 MR. JACOB: Okay.

12 BY MR. JACOB:

13 Q. Well, I'll represent to you that the -- this is based on
14 evidence that's already in the record that the police did a
15 background check, and it revealed nothing.

16 THE COURT: One second.

17 Is there a question?

18 MR. JACOB: Yes, Your Honor.

19 THE COURT: What's the question?

20 MR. JACOB: The question is, I'm going to ask her
21 about another consequence of the failure to have that
22 information in the system.

23 THE COURT: But what's the question?

24 MR. JACOB: The specific question is whether she's
25 aware that it hurt a witness' credibility when that

1 information wasn't in the system.

2 THE COURT: What's the objection?

3 MR. STERN: Objection. Speculation.

4 THE COURT: That's sustained.

5 BY MR. JACOB:

6 Q. Okay. Ms. Del Greco, let me actually show you -- and I'm
7 going to cue up -- this has been preadmitted. Willis -- the
8 testimony of Ms. Willis, page 105, lines 18 through 25. And
9 I'll represent to you Ms. Willis is an individual and a
10 roommate of the Kelleys' that reported Kelley as a child
11 abuser.

12 MR. STERN: Objection. This is now a narrative.

13 THE COURT: Yeah. So what's the question?

14 MR. JACOB: The question -- let me -- I was going to
15 play it for her and then ask the question.

16 MR. STERN: But, Your Honor --

17 THE COURT: But she didn't have knowledge. So
18 where's this going?

19 MR. JACOB: My point, Your Honor, is that the
20 information that the Air Force failed to submit into the NICS
21 database hurt a eyewitness' credibility in front of the police
22 when the eyewitness reported a child abuse crime that would
23 have put Devin Kelley in prison and prevented this massacre.

24 MR. STERN: Objection. Speculation. It calls --
25 it's a legal conclusion and a narrative, which should be

1 stricken from the record.

2 THE COURT: Yeah. I'll take this one question at a
3 time. Continue.

4 BY MR. JACOB:

5 Q. Okay. Mr. Hanko, please play for Ms. Del Greco page 105,
6 lines 18 through 25 of Ms. Willis' testimony.

7 *(Playing video)*

8 BY MR. JACOB:

9 Q. Ms. Del Greco, one of the ways the FBI CJIS division helps
10 protect public safety is providing information like the
11 background check information of Devin Kelley, so they can
12 assess the credibility of eyewitnesses; right?

13 MR. STERN: Objection. Leading.

14 THE COURT: That's overruled.

15 THE WITNESS: That would be provided to III, not to
16 NICS. Law enforcement would not have access to the NICS
17 database. They would have access to anything that's submitted
18 to III. And that is your fingerprints, your arrest
19 information, and the criminal history that is associated with
20 that arrest.

21 BY MR. JACOB:

22 Q. Right. Fingerprints like the FD-249 fingerprint card?

23 A. Fingerprints and arrest information and the criminal
24 history that is associated with that arrest.

25 Q. Right.

1 And my question was actually a little different. My
2 question was whether the CJIS division helps -- and CJIS is
3 the division that you used to work for; right?

4 A. I currently work there, yes.

5 Q. Okay.

6 A. Yeah.

7 Q. And the CJIS division is a -- has ownership of the NICS
8 database; right?

9 A. We have ownership of all three databases, but NICS is
10 separate from III.

11 Q. And NICS searches III, NCIC, and the NICS indices; right?

12 A. That's correct.

13 Q. Right.

14 My question is: One of the ways that CJIS, the FBI, helps
15 protect public safety is by providing information in the III
16 and the NCIC to law enforcement agents so they can make
17 credibility determinations about eyewitnesses?

18 A. Yes.

19 Q. And if an eyewitness tells a law enforcement agent that,
20 you know, I think this person has a criminal history of a
21 felony and a domestic abuse, this person's a bad person, and
22 that check of the NCIC comes back as having none of that
23 history, that could hurt that witness' credibility; isn't that
24 true?

25 THE COURT: One second.

1 MR. STERN: Objection. Speculation. Leading.

2 THE COURT: Okay. You can answer, if you know.

3 THE WITNESS: I can't surmise what a law enforcement
4 agency would do if they had access to information. That is up
5 to them.

6 BY MR. JACOB:

7 Q. Okay. Ms. Del Greco, I want to talk to you a little bit
8 about the time from 2012 -- or from December 12th, 2014, to
9 the Sutherland Springs shooting, November 5th, 2017. That's
10 three -- about three years; right?

11 A. Yes.

12 Q. And, you know, one of the issues that -- in this case is
13 about what would happen if Devin Kelley were able to get
14 firearms through a delay in the NICS system.

15 You're aware of that?

16 A. Restate the question again. I want to make sure I
17 understand you correctly.

18 Q. Yeah. Let me actually just talk to you about the
19 documents themselves.

20 Let's look at PEX 797. Okay?

21 A. Okay.

22 Q. And I want to show you page 27 of PEX 797. And this is
23 the NICS report from 2016 that we discussed earlier; right?

24 And I'm going to call out the first paragraph of PEX 797, page
25 27.

1 Can you tell the Court what "firearm retrieval referrals"
2 are?

3 A. Yes. If we have delayed a transaction because additional
4 research is needed before a final decision could be made on a
5 potential firearm transaction and information comes in after
6 the third business day and it denies the transaction, we
7 notify ATF that day that we have a denial and a potential
8 referral for retrieval to ATF.

9 Q. And in 2016, the NICS section referred 4,170 firearm
10 retrieval actions to the ATF; is that right?

11 A. That's correct.

12 Q. And you expect --

13 THE COURT: Just so I'm clear on this, so after three
14 business days, the FFL can still sell the weapon --

15 THE WITNESS: Yeah.

16 THE COURT: -- and so this retrieval is you telling
17 the ATF, "Go get that weapon from this person who shouldn't
18 have gotten it in the first place"?

19 THE WITNESS: We recommend to ATF that there is
20 someone that's prohibited that had received one, yes. We
21 know -- we -- clarifying, we call the FFL, notify him of the
22 denial, and he tells us if the firearm has been sold.

23 BY MR. JACOB:

24 Q. Right. And that only happens if there's a delay; right?

25 A. It does, yes.

1 Q. But in the vast majority of cases, 90 percent of the times
2 it's an instant denial; right?

3 A. Proceed or denial, correct.

4 Q. Proceed or deny.

5 Ms. Del Greco, I want to show you another document.
6 Actually, Plaintiffs' Exhibit Demonstrative Exhibit A.

7 Can you tell me if you can read this. All right?

8 MR. STERN: Your Honor, we do object to this
9 demonstrative.

10 THE COURT: So what is this?

11 MR. JACOB: Your Honor, this is a demonstrative of
12 admissions that we've gotten from various Air Force employees.
13 I'm actually not going to be asking her about this side of the
14 document. I'm just going to be asking her about this side of
15 the document. It's --

16 MR. STERN: Your Honor --

17 THE COURT: One second. Let me read it.

18 So what's the objection?

19 MR. STERN: Your Honor, as if the name of the
20 demonstrative isn't telling enough, all of these questions
21 that were asked are calls for legal conclusions. We objected
22 during the deposition designations. We have renewed those
23 objections during the deposition designations for purposes of
24 this trial.

25 To ask witnesses whether there is an increased risk of

1 harm is an element of the duty at issue, and that is the pure
2 province of the Court to decide. It's inappropriate to ask
3 Ms. Del Greco about an increased risk of harm, much less these
4 lay witnesses who were asked during their depositions. Now
5 they want to blow this up and show it as a demonstrative. And
6 that's inappropriate.

7 MR. JACOB: First of all, Your Honor, this is already
8 evidence that's -- this side of the board, the witness
9 admissions are already in evidence, with the deposition
10 transcripts that we filed with the Court previously.

11 MR. STERN: They're in evidence with our objections
12 and with our renewed objections.

13 THE COURT: Right. So he's going to ask her
14 questions about the left-hand side of that demonstrative. I'm
15 disregarding the title of it. With the exception of the
16 fourth bullet point, though, the other ones aren't asking for
17 any kind of legal conclusion. They're asking about what the
18 NICS does.

19 MR. STERN: And to the extent that she can answer
20 those from her personal knowledge, there's no need to have
21 this demonstrative up for --

22 THE COURT: It's just demonstrative. We're not here
23 in front of a jury.

24 Go ahead.

25 MR. STERN: Thank you, Your Honor.

1 BY MR. STERN:

2 Q. Ms. Del Greco, isn't it fair to say that government
3 agencies should collect fingerprints and submit them to the
4 FBI upon criminal arrests?

5 A. Correct.

6 Q. Government agencies should collect and submit deniable
7 offenses of felons and child abusers to the FBI?

8 A. Upon arrest.

9 Q. And government agencies should collect incomplete
10 information?

11 A. Yes.

12 Q. And isn't it also fair to say that time is of the essence
13 when it comes to reporting this type of disposition
14 information to the FBI?

15 A. We would like to have the information timely and accurate
16 so it's available to all law enforcement across the nation.

17 Q. Right. For the NICS to work, federal agencies must
18 collect -- accurately collect and submit criminal history data
19 upon arrest?

20 A. That's correct.

21 Q. Isn't it also fair to say that the more information the
22 FBI has on dangerous felons, the better decisions that they
23 can make in preventing individuals who shouldn't have firearms
24 from getting those firearms?

25 A. That's correct.

1 Q. Ms. Del Greco, isn't it fair to say that the NICS
2 decreases the risk of shooting deaths by keeping guns out of
3 the hands of felons?

4 MR. STERN: Objection. Calls for a legal conclusion.

5 THE COURT: Can you answer that question?

6 Has your agency done any kind of analysis to make that
7 kind of determination?

8 THE WITNESS: The FBI does not study increase or
9 decrease risks to the American -- the American people. We
10 process the transaction as the system was designed.

11 We do know, from historical cases, people have obtained a
12 firearm in many different ways to commit a crime. But we
13 don't study that at the FBI.

14 BY MR. JACOB:

15 Q. Isn't it true that the reason that the FBI doesn't study
16 that is Congress passed a bill preventing the research on gun
17 violence, by government agencies?

18 A. I'm unaware, in all of my years at CJIS, about that law.
19 We are -- we don't consider our job the job to study the
20 impact to the community.

21 THE COURT: Next question.

22 BY MR. JACOB:

23 Q. Well, let's be very clear, then. We do know that if
24 Kelley's fingerprints had been submitted (loud microphone
25 noise) final disposition -- let me restate the question,

1 Ms. Del Greco.

2 If Devin Kelley's fingerprints and final disposition had
3 been submitted to the FBI, he would have been prohibited from
4 purchasing the firearm, the very firearm that he used to kill
5 26 people; isn't that true?

6 A. That is correct.

7 MR. JACOB: Your Honor, we pass the witness.

8 THE COURT: Any cross?

9 MR. STERN: There is. Can we have five minutes, Your
10 Honor?

11 THE COURT: Yes. We'll break for five.

12 *(Recess)*

13 *(Open court)*

14 THE COURT: Thank you. Please be seated.

15 Any cross?

16 MR. STERN: Please, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. STERN:

19 Q. Deputy Assistant Director Del Greco, good morning.

20 A. Good morning.

21 Q. As you may recall, my name is Paul Stern. I'm an attorney
22 with the Department of Justice. Thank you for being here
23 today.

24 A. You're welcome.

25 Q. I believe you've previously testified that the mission of

1 NICS is to enhance national security and public safety; is
2 that correct?

3 A. That is correct.

4 Q. And do you believe you're successful in your mission?

5 A. I do.

6 Q. Okay. You had -- you successfully ensure that prohibited
7 individuals are prevented from obtaining firearms?

8 A. With the information that we have available to us, yes.

9 Q. Okay. But you also said that the system was limited in
10 its design?

11 A. That is correct.

12 Q. How so?

13 A. I mean, we -- it's a shared management database, and we
14 get information from all federal, state, local, and tribal law
15 enforcement agencies to allow us to access their records on a
16 national level. The examiners are trained extensively, but
17 they all make their own decision based on the information they
18 have in front of them.

19 Q. Is it also limited in its design, based on whether FFLs
20 versus non-FFLs have to participate?

21 A. Yes.

22 Q. How so?

23 A. Well, an FFL has to be registered with the NICS in order
24 to process a firearm transaction with us.

25 Q. Again, could you remind the Court what "FFL" stands for?

1 A. Absolutely. It's a Federal Firearms Licensee.

2 Q. Okay. And is -- are the entities that have to register
3 with NICS, is that defined by federal law?

4 A. It is.

5 Q. Okay. So is it -- is it a business that is engaged in the
6 business of selling firearms?

7 A. We process the transaction. It is -- it is the FFL that
8 makes the determination whether to actually sell the firearm.

9 Q. Correct.

10 But you -- as you suggested, it's limited to only FFLs;
11 correct?

12 A. That is correct. Yes, sir.

13 Q. So is there a legal definition for -- for an FFL in order
14 to have to participate in the NICS system?

15 A. I'm not aware of a legal definition.

16 Q. Okay. Let's pull up Joint Exhibit 32 -- I'm sorry --
17 Government's Exhibit 32. And that is 18 USC 921. Can we look
18 at (a) (21) (D)?

19 So if you look at --

20 MR. JACOB: Your Honor, this -- I object. This
21 witness testified she's not aware of this information.

22 MR. STERN: Your Honor, this --

23 MR. JACOB: She would be speculating, Your Honor.

24 MR. STERN: Showing her the law, which, obviously,
25 the Court can take judicial notice of.

1 THE COURT: Yeah. So, I mean, you're not asking her
2 to opine on the law. So what's the question going to be?

3 MR. STERN: The question is whether or not those who
4 are engaged in the business of selling firearms are those that
5 have to register as FFLs.

6 THE COURT: Why don't you just ask her the other way?
7 What's your -- what's your understanding of non-FFLs?

8 THE WITNESS: A non-FFL is a private sale, family
9 members selling firearms. I'm -- I'm not sure what --

10 THE COURT: And you-all don't regulate those? You
11 don't --

12 THE WITNESS: No, we do not.

13 THE COURT: So point made. Move on.

14 THE WITNESS: And it happens regularly.

15 MR. STERN: Thank you, Your Honor.

16 BY MR. STERN:

17 Q. Just to clarify, non-FFLs don't have to participate in
18 NICS background checks before they sell the firearms. Is that
19 fair?

20 A. That is correct.

21 Q. And are you aware of some of the ways that non-FFLs are
22 able to sell firearms?

23 A. We do. I mean, we know that there are stolen firearms.
24 There are gun shows. There are ghost guns. There are family
25 members that share guns. There are many different ways to

1 obtain a firearm.

2 Q. What about through online sources?

3 A. Yes, and online, correct.

4 Q. So is it fair to say that NICS performs background checks
5 within the legal parameters set forth in the Brady Act?

6 A. Correct.

7 Q. And in your experience, are prohibited individuals able to
8 circumvent the background check to obtain firearms?

9 MR. JACOB: Objection. Speculation.

10 MR. STERN: If she knows.

11 THE COURT: If you know.

12 THE WITNESS: We do know that people get guns outside
13 of a NICS check.

14 BY MR. STERN:

15 Q. And plaintiffs showed you statistics regarding the number
16 of felons who were denied sales at FFLs in 2016.

17 Do you recall that?

18 A. Yes.

19 Q. Do you know how many of them were able to circumvent NICS
20 to obtain firearms?

21 A. I don't know how many. But we do see on a weekly basis
22 crimes committed without --

23 MR. JACOB: Objection, Your Honor. Speculation. She
24 testified --

25 THE COURT: She's answering to her knowledge.

1 Go ahead.

2 THE WITNESS: We -- we see on a weekly basis, crimes
3 that are committed. We research that in our database and see
4 that a NICS check has not been initiated.

5 BY MR. STERN:

6 Q. Did Devin Kelley have alternative means through which to
7 obtain firearms through non-FFL sources?

8 A. He showed intent.

9 Q. You suggested he showed intent. If we could talk a little
10 bit more about that. If we could pull up Joint Exhibit 345.
11 Start with number 4, please. Page 4, please.

12 TECHNOLOGY SPECIALIST: 4?

13 MR. STERN: Yes.

14 BY MR. STERN:

15 Q. Again, I believe plaintiffs' counsel showed you this
16 ATF 4473 form; do you recall?

17 A. Yes.

18 Q. Okay. And can you tell the Court what is an ATF 4473
19 form?

20 A. It's a required form that the FFL gives a potential
21 purchaser to fill out. They have to put their biographics and
22 answer all of the questions honestly on the form.

23 Q. Okay. And can you read the warning label on the top of
24 the form?

25 A. "You may not receive a firearm if prohibited by federal or

1 state law. The information you will provide will be used to
2 determine whether you are prohibited under law from receiving
3 a firearm. Certain violations of the Gun Control Act, 18 USC
4 921, are prohibitive by up to ten years imprisonment and/or up
5 to a \$250,000 fine."

6 Q. So is this warning the individual who's filling out the
7 form that a violation of the Gun Control Act may be subject to
8 ten years imprisonment and up to \$250,000 --

9 A. Yes.

10 Q. -- fine? Thank you.

11 Then if we look at the second page, can you read the
12 certification block. Why don't we have you read where it
13 says, "I also understand that making any false..." In the
14 middle of the paragraph, please.

15 A. Would you like me to read that?

16 Q. Please.

17 A. "I also understand that making any false oral or written
18 statement or exhibiting any false or misrepresented
19 identification with respect to this transaction is a crime
20 punishable as a felony under federal law, and may also violate
21 state and/or local law."

22 Q. So when Devin Kelley was filling out this form, he knew
23 that any lies that he told in filling out that form would
24 subject him to that same -- fines of \$250,000 and up to ten
25 years imprisonment?

1 A. Yes.

2 Q. Let's take a look at the first page of the form again,
3 then. Can you read to the Court Question 11?

4 So this requires -- does this require that Devin Kelley
5 answered various questions about whether or not he was
6 prohibited from owning or possessing firearms under the Gun
7 Control Act?

8 A. Yes. That's correct.

9 Q. And based on your knowledge, was Devin Kelley truthful in
10 providing those answers to Question 11?

11 A. No.

12 Q. Why not?

13 A. He answered "no" to all of the questions that were
14 relevant to his criminal act.

15 Q. You say "his criminal act." Let's take a look at 11(c).
16 If you can read that one.

17 A. You would like me to read it?

18 Q. Please.

19 A. Okay. "Have you ever been convicted in any court of a
20 felony, or any other crime, for which the judge could have
21 imprisoned you for more than one year, even if you received a
22 shorter sentence, including probation."

23 Q. Thank you.

24 And he answered "no" to that; correct?

25 A. That is correct.

1 Q. Take a look at 11(j). I'm sorry. 11(i), please, if you
2 don't mind.

3 A. "Have you ever been convicted in any court of a
4 misdemeanor crime of domestic violence?"

5 Q. Did Devin Kelley answer that question truthfully?

6 A. No.

7 Q. So, in other words, was Devin Kelley willing to lie and
8 subject himself to a felony charge, with a punishment of up to
9 ten years imprisonment and \$250,000, in order to obtain
10 firearms?

11 A. Yes, he was.

12 Q. As the deputy assistant director of NICS, what does
13 someone's willingness to lie on their ATF 4473 form indicate
14 to you?

15 MR. JACOB: Objection. Speculation.

16 THE COURT: That's overruled.

17 THE WITNESS: They have intent to obtain a gun in any
18 means capable to them.

19 BY MR. STERN:

20 Q. Including a willingness to break the law in order to
21 obtain firearms?

22 A. That's correct.

23 Q. Including a willingness to conceal their past convictions
24 to obtain firearms?

25 A. Yes.

1 Q. Does it indicate their determination to obtain firearms?

2 A. Absolutely.

3 Q. Taking a look at Joint Exhibit 65, please.

4 Have you seen this document before?

5 A. Yes.

6 Q. What is it?

7 A. It's a statement by Danielle Kelley.

8 Q. Does she indicate in that statement that she went with
9 Devin Kelley to a Dick's Sporting Goods?

10 A. Yes.

11 Q. And what was the result of that attempted transaction at
12 Dick's?

13 A. It was denied.

14 Q. And does she state a reason why she thinks it was denied?

15 A. I believe it was the Colorado law that required Dick's to
16 deny that transaction.

17 Q. Okay. Then if we look down at paragraph 5, can you read
18 that paragraph, please?

19 A. Sure. "In or around April 2016, Devin and I went to
20 Academy in Selma, Texas. There, he purchased a Ruger AR-556.
21 That day, he also purchased a magazine and ammunition. It was
22 a quick and easy transaction. It is my understanding that the
23 firearm Devin used in the Sutherland Springs shootings was an
24 AR-556 that Devin bought at Academy, located in Selma, Texas."

25 Q. So according to Devin Kelley's wife, Devin Kelley actually

1 went to an FFL and was denied?

2 A. Correct.

3 Q. And then he continued to try to obtain firearms?

4 A. Correct.

5 Q. In fact, he didn't even bother to change his driver's
6 license from Colorado to Texas before he went to continue to
7 obtain -- attempt to obtain firearms?

8 A. That's correct.

9 Q. As the deputy assistant director of NICS, does his attempt
10 to obtain firearms after he was denied at an FFL tell you
11 anything about his intent?

12 A. To me, it tells me that he will obtain a firearm in any
13 means capable to him -- available to him.

14 Q. Including violating the law?

15 A. Including violating the law.

16 Q. Was Devin Kelley deterred from trying to obtain firearms?

17 A. No, he was not.

18 Q. Did he see the error of his ways in trying to obtain
19 firearms through FFLs?

20 A. I don't believe so, no.

21 Q. Did he see the error of his ways in any attempts of his to
22 obtain firearms?

23 A. No.

24 Q. I'd like to pull up an exhibit that plaintiffs' counsel
25 showed you regarding the NICS overview. I believe it's Joint

1 Exhibit 496, please. You've already briefly discussed this
2 document. But what is it?

3 A. It is a PowerPoint presentation, giving the general
4 overview of NICS.

5 Q. Thank you.

6 And I believe you already spoke briefly about page 5, but
7 let's pull that one up. Could you clarify for the Court what
8 is the difference between a POC and a non-POC state?

9 A. Sure. A POC state is full point of contact state. And
10 the FFLs in the POC states go to the state police agencies,
11 state criminal justice agency to process their firearms. They
12 do use the NICS system, but they also use other state
13 databases to make a determination.

14 In the non-POC states, nonpoint of contact states, the
15 FFLs come directly to the NICS, and we search our system.

16 Q. So why would a state want to be a POC state?

17 A. Some states have a revenue that they get from a gun sale,
18 and they have other state databases that they can access.

19 Q. So, in other words, for a non-POC state, they go to --
20 through NICS to perform the database search based on the three
21 databases that CJIS operates; is that fair?

22 A. Yes.

23 Q. Is it fair to say that POC states want to do it themselves
24 because they can check those three databases as well as other
25 state databases?

1 A. That's correct.

2 Q. So it might be a more comprehensive search?

3 A. Yes.

4 Q. And we look at Texas, that's green; right? That means
5 it's a non-POC state?

6 A. That's correct.

7 Q. I'd like to turn to page 20, please.

8 Can you read the portion in red?

9 A. "UCMJ offenses are not classified as felonies or
10 misdemeanors. Punishment for an offense may not exceed such
11 limits" as President -- "as the President may prescribe for
12 that offense."

13 Q. And what does "UCMJ" stand for?

14 A. Uniform Code of Military Justice.

15 THE COURT: Where is this coming from?

16 MR. STERN: I'm sorry?

17 THE COURT: Where is this coming from? Is this some
18 law you're citing to me, or what -- what is this?

19 MR. STERN: Your Honor, this is the overview that
20 plaintiffs' counsel used regarding NICS?

21 THE COURT: No, I know that. But if you're asking me
22 to make decisions, I want to know -- here, there's some
23 confusion about which UCMJ offense he was convicted of.

24 Is that the purpose of showing this me or...

25 MR. STERN: The purpose is when you actually look at

1 a database such as III, it's not self-evident that there would
2 be an automatic denial or that a local law enforcement officer
3 would know that's the equivalent of a felony because you need
4 to convert an article violation under the UCMJ into a state
5 felony or a misdemeanor of domestic violence.

6 THE COURT: So just so I'm clear, then, based upon
7 what Devin Kelley was court-martialled for and convicted by
8 court-martial, should that information have been sent by the
9 Air Force to the NICS?

10 THE WITNESS: To III.

11 THE COURT: To III.

12 THE WITNESS: Yes.

13 THE COURT: And so that information in III would have
14 eventually shown up in any NICS check?

15 THE WITNESS: It would. However, the NICS examiner
16 would not immediately make a determination on a UCMJ without
17 doing research. It doesn't give us an immediate response.

18 THE COURT: So, I mean, you're the chief of that
19 section. Devin Kelley's conviction, does that show -- what
20 you -- is that a gray area, or was it a clearcut area for you
21 to be able to say yes or no to?

22 THE WITNESS: Depending on -- for this particular
23 case, an Article 128 would need do research. There are
24 different various levels of assault. So the NICS examiner has
25 military pages that they refer to. We have internal websites

1 that we access of DoD. So we would actually have to do some
2 research first. And if it's not clear, completely, we would
3 have to reach out to the Air Force for a final disposition on
4 what the maximum conviction would be for that assault.

5 THE COURT: So we know none of that was done because
6 the Air Force never gave you the information in the first
7 instance; right?

8 THE WITNESS: That's correct.

9 THE COURT: Now, let's just assume hypothetically
10 that they had. Have you-all done an analysis now as to
11 whether or not that would have shown up as a yes, you can buy,
12 or a denial?

13 Yeah. You answer my questions. You don't look to him.

14 THE WITNESS: I just want to make -- so the first
15 sentence, for Tessa Kelley, the NICS examiner would have to
16 determine who Tessa Kelley was. The element of force is
17 there. And so once they determine that she is his wife -- at
18 the onset of the record, we would not know who Tessa Kelley
19 is.

20 But the second sentence that he received for the juvenile,
21 we would have been able to deny, referring to that record. It
22 said "guilty" on the charge. The NICS examiner only needs
23 one -- one denial to deny the firearm.

24 THE COURT: Thank you.

25 THE WITNESS: You're welcome.

1 MR. STERN: Your Honor, I'd like to continue with
2 that line of questioning. Just --

3 THE COURT: Go ahead.

4 BY MR. STERN:

5 Q. Based on the -- the way that you just outlined how a NICS
6 examiner would have to interpret an Article 128(g) violation
7 under the UCMJ, would it be fair to assume that if a local law
8 enforcement officer checked III and saw a UCMJ violation,
9 they, likewise, wouldn't know it's an automatic felony?

10 A. They would not know.

11 Q. And so if they had to invoke any state obligation to
12 obtain -- to arrest someone based on a felony possession of a
13 firearm, would they know automatically, based on that UCMJ
14 violation, that that individual had been prohibited from
15 owning or possessing a firearm?

16 A. I think they would have to refer to the same military
17 pages that our examiners refer to.

18 Q. Thank you.

19 I believe plaintiffs' counsel briefly spoke about -- a
20 question about credibility of one of the Kelleys' former
21 roommates, Emily Willis.

22 Do you recall that --

23 A. Yes.

24 Q. -- testimony?

25 I'd like to show you a few pages concerning her report to

1 the police. Let's take a look at Joint Exhibit 521, please.

2 We see here the first line under the comments is "complainant
3 Emily Wollis." I believe that's Willis?

4 A. Yes.

5 Q. And then the third line, "RP believes roommate's child is
6 being abused."

7 A. Yes.

8 Q. The fourth line reads, "No BOLO."

9 Do you know what "no BOLO" means?

10 A. I do. And I can't recollect it right now.

11 THE COURT: Be on the lookout.

12 THE WITNESS: Yes. Thank you.

13 MR. STERN: It's fair.

14 BY MR. STERN:

15 Q. So according to this document, there was no be on the
16 lookout for the Kelleys; correct?

17 A. That's right.

18 Q. And then if we look another two lines down, "UNK location
19 of child or mother." It's fair to say, the location of the
20 child or mother were unknown?

21 A. That's correct.

22 Q. And then a little further down it says, "RP woke up this
23 morning and roommate, child, and belongings are gone."

24 Did I read that correctly?

25 A. Yes.

1 Q. And a little further down it says, once again, "No BOLO"?

2 A. Yeah.

3 Q. Okay. Are you aware that Emily Willis testified that the
4 night before she contacted the police, Devin Kelley took
5 Danielle and the child and moved back to Texas?

6 A. Yes.

7 Q. And so as a result, that's why she's telling the law
8 enforcement officers that she woke up this morning and the
9 roommate and child and belongings were gone?

10 A. Yes.

11 Q. Is it fair to say that it's difficult to prosecute a
12 domestic violence case when the victim is no longer present in
13 the state?

14 A. Yes.

15 Q. Are you here to speculate as to whether the El Paso County
16 Sheriff's office would have handled this case any differently
17 had Devin Kelley's information been in III?

18 A. I mean, it's case by case, officer by officer on how they
19 would handle a situation.

20 Q. Okay. I want to transition and discuss the point in time
21 in which someone is prohibited under the Gun Control Act. Is
22 that okay?

23 A. That's fine.

24 Q. When does an individual become prohibited from possessing
25 or owning a firearm under a 922(g)(1)?

1 A. When we have a complete, final disposition.

2 Q. The disposition of the conviction?

3 A. Yes.

4 Q. So before that time, they're not prohibited under the Gun
5 Control Act; correct?

6 A. Unless they're under indictment.

7 Q. Okay. So we'll get to that one.

8 A. Okay.

9 Q. But let's talk about 922(g)(9).

10 A. Yes.

11 Q. Would that also require a conviction?

12 A. Yes.

13 Q. Okay. And then you alluded to a 922(n).

14 What is that in reference to?

15 A. That means a person's under indictment. And the NICS
16 examiner then can deny a firearm as well.

17 Q. Okay. So the first time the individual would actually be
18 prohibited from owning or possessing a firearm under the Gun
19 Control Act is at the time of indictment?

20 A. That's correct.

21 Q. Do you know what the equivalent of an indictment is under
22 the Uniform Code of Military Justice?

23 A. I believe it's when it's referred to general
24 court-martial.

25 Q. And I'll stipulate -- I'll represent to you that the

1 parties have already stipulated that Devin Kelley's referral
2 of charges occurred on August 27th, 2012.

3 A. That's correct.

4 Q. Thank you.

5 MR. STERN: In fact, I can pull up that exhibit for
6 Your Honor, although it has been stipulated. I can move on.

7 THE COURT: That's fine. I got it down.

8 MR. STERN: Okay. Thank you.

9 BY MR. STERN:

10 Q. Then I'll move on. Take a look at Joint Exhibit 18,
11 please. Take a look at the third page.

12 This shows Devin Kelley purchased a revolver at Holloman
13 Air Force Base Exchange on February 12th, 2012; is that
14 correct?

15 A. Yes.

16 Q. Would there have been any basis for the FBI to issue a
17 denial at that time?

18 A. No.

19 Q. Even if his fingerprints were in the system at that time,
20 would there have been any basis to prohibit Devin Kelley from
21 owning or possessing a firearm?

22 A. No. Having a fingerprint does not equate to a denial.

23 Q. Thank you.

24 Moving on to Joint Exhibit 16, same question with regards
25 to this 4437 Form. If we look at the third page, again, this

1 is another purchase by Devin Kelley of a firearm at the
2 Air Force -- the Holloman Air Force Base Exchange. This one
3 occurred on, I believe, April 12th, 2012; is that correct?

4 A. Yes.

5 Q. Again, same question. Was there any basis to deny Devin
6 Kelley at this point in time?

7 A. No.

8 Q. Even if his fingerprints were in the system at that time,
9 would there have been any basis to prohibit him for owning or
10 possessing a firearm?

11 A. It would not, no.

12 Q. In all of your years of experience as not just the deputy
13 assistant director of NICS, but all your time at CJIS, have
14 you ever heard of an individual being conditioned to purchase
15 guns at an FFL because they received a delay or proceed as
16 opposed to a denial?

17 A. I think it's up to the individual on how their mental
18 state is, and, you know, their desire to have a firearm.

19 Q. I want to transition and talk about one of the two
20 investigations into Devin Kelley during his time at the
21 Air Force.

22 Are you aware that there were two separate investigations
23 of Devin Kelley?

24 A. Yes.

25 Q. One of those were conducted by the 49th Squadron Security

1 Forces. Do you -- is that correct?

2 A. That is correct.

3 Q. And the other one is by the Air Force Office of Special
4 Investigations?

5 A. That's correct.

6 Q. Okay. There's been testimony that's been admitted into
7 evidence already from a Colonel Ford who was a 30(b)(6)
8 witness on behalf of the Security Forces. He testified that
9 Devin Kelley's -- the result of the investigation by Security
10 Forces Squadron of Devin Kelley ended in a letter of
11 reprimand.

12 Would a letter of reprimand be a basis to prohibit an
13 individual from owning or possessing firearms?

14 A. It would not.

15 Q. Why not?

16 A. That's an administrative action. And it doesn't -- I
17 believe there are no arrest charges against anyone with a
18 letter of reprimand.

19 Q. Let's pull that up, if you can. Joint Exhibit 21, page 73
20 and 74.

21 So this is the letter of reprimand Devin Kelley received
22 as a result of the investigation by Security Forces personnel;
23 correct?

24 A. That is correct.

25 Q. If you can read the first sentence on paragraph 1.

1 A. "Investigation has revealed that you physically assaulted
2 Mrs. Tessa K. Kelley on or about February 17, 2012, at 2629B
3 McKinley Loop, Holloman Air Force Base, New Mexico."

4 Q. So this is investigating the abuse engaged in by Devin
5 Kelley on February 17th, 2012; correct?

6 A. That's correct.

7 Q. And if we read the first sentence in paragraph -- or first
8 two sentences in paragraph 2.

9 A. "You are hereby reprimanded! Your actions violated
10 Article 128 of the UCMJ-Assault. I need you to understand
11 that your conduct was criminal and cannot continue."

12 Q. Thank you.

13 So this was his -- equivalent of his punishment; correct?

14 A. That's correct.

15 Q. It was not a conviction?

16 A. No.

17 Q. He would not have been prohibited under the Gun Control
18 Act --

19 A. He is not.

20 Q. -- as a result of this conviction?

21 A. Yes.

22 Q. I'm sorry?

23 A. I'm sorry. He is not.

24 Q. Thank you.

25 In fact, if you look at the second page of this document,

1 Devin Kelley signed it; correct?

2 A. That's correct.

3 Q. So, again, if Devin Kelley's letter of reprimand was the
4 result of the investigation by Security Forces, and that
5 entire investigation ended in a letter of reprimand, then
6 could the investigation by the Security Forces have caused
7 Devin Kelley to be prohibited from owning or possessing a
8 firearm?

9 A. No, they could not.

10 Q. Again, even if his fingerprints would have been submitted?

11 A. Even if his fingerprints are submitted.

12 MR. STERN: Pass the witness.

13 THE COURT: Any questions?

14 MR. JACOB: Yes, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. JACOB:

17 Q. Ms. Del Greco, I want to pick up with the discussion of
18 these guns that Kelley got prior to his conviction. Okay?
19 You remember that conversation?

20 A. Yes.

21 Q. Mr. Stern talked to you about a couple of guns that he
22 bought on February 12th and April 12th of 2012; right?

23 A. Correct.

24 Q. Were you aware that the first gun that Mr. Kelley got was
25 actually confiscated by the Air Force before his conviction?

1 MR. STERN: Objection. Relevance?

2 THE COURT: What is the relevance of that?

3 MR. JACOB: Well, Your Honor, they're arguing that
4 Kelley would have gotten these guns because his conviction
5 wouldn't have denied it, and maybe he would have used these
6 guns. But I'm about to show that all of these guns, prior to
7 his conviction, were either confiscated by the Air Force or
8 his dad.

9 MR. STERN: I don't understand what the scope -- what
10 the alleged duty is with regards to confiscation, or we were
11 -- and, furthermore, we're only simply arguing that he was not
12 prohibited from owning or possessing firearms prior to these
13 referral of charges.

14 THE COURT: That's sustained.

15 Move on.

16 MR. JACOB: Yes, Your Honor.

17 BY MR. JACOB:

18 Q. Ms. Del Greco, I do want to talk, though, about JEX 20.
19 Mr. Stern talked to you about how a letter of reprimand was
20 not a -- not a reason for denial of a firearm.

21 Do you remember that conversation?

22 A. Yes.

23 Q. I want to show you JEX 20. You see that on your screen?

24 A. Yes.

25 Q. And you should see at the top it says, "Report of Trial."

1 We can make that a little bigger. You see "Report of Trial"?

2 A. Yes.

3 Q. And this is a report of trial -- results of trial for
4 Devin Kelley; right?

5 And you can see that the organization is the 49th
6 Logistics Squadron; right?

7 A. Yes.

8 Q. It's a general court-martial?

9 A. Correct.

10 Q. And you can -- and if we scroll down, you'll see the two
11 charges that you were discussing with the Court; right?

12 A. That's correct.

13 Q. The second charge is the charge for the assault on the
14 child.

15 A. That's correct.

16 Q. Do you remember that?

17 Now, let's keep scrolling down, if you wouldn't mind, to
18 the bottom of that page.

19 Do you see the "distribution" section?

20 A. I do.

21 Q. And do you see the 49th Security Forces Commander SFOI?

22 A. Yes.

23 Q. So this document was actually distributed to the Security
24 Forces Squadron; right?

25 A. I don't know that.

1 Q. Well, I'll represent to you, we already have in evidence
2 that this document was distributed to the Security Forces
3 commander, and that they had the information of the Report of
4 Trial to report to the -- to the FBI. Okay?

5 A. Okay.

6 Q. And so based on this information, the Security Forces
7 should report his conviction to the -- to the FBI; isn't that
8 true?

9 MR. STERN: Objection. Leading. Speculation.

10 THE COURT: That's overruled.

11 BY MR. JACOB:

12 Q. Based on the Report of Trial that was reported to the
13 Security Forces, they had enough information to report his
14 conviction for a felony and domestic abuse to the FBI; isn't
15 that true, Ms. Del Greco?

16 A. Yes.

17 Q. Ms. Del Greco, I also want to talk to you about the ten
18 years in prison. You remember how Mr. Stern talked to you
19 about Devin Kelley lied on his ATF forms in December of 2014?

20 A. Yes.

21 Q. That would have subjected him to ten years in prison?

22 A. Yes.

23 Q. He lied on his ATF form in June 26, 2015?

24 A. Yes.

25 Q. That would have subjected him to ten years in prison?

1 A. Yes.

2 Q. So we're at 20 years now?

3 A. I don't know how they would adjudicate that.

4 Q. He lied on his April 7, 2016 ATF form?

5 A. Yes.

6 Q. That's another ten years in prison?

7 MR. STERN: Objection. Speculation.

8 THE COURT: -- doesn't know that already.

9 MR. JACOB: I'm asking whether that violation is a
10 ten-year prison sentence.

11 THE COURT: Are you asking cumulatively, or you're
12 saying that's the maximums he could have been receiving?

13 MR. JACOB: Yes. That's the maximum he could have
14 been receiving.

15 THE COURT: Go ahead.

16 BY MR. JACOB:

17 Q. For this lie on April 7, 2016, the maximum punishment for
18 his lie was ten years in prison; isn't that true?

19 A. That's correct.

20 Q. For this lie on April -- or August -- October 18th, 2017,
21 the maximum sentence is ten years in prison; right?

22 A. That's correct.

23 Q. Now, Ms. Del Greco, I want to show you Plaintiffs' Exhibit
24 798, which has been admitted into evidence already. And it
25 should pop up on your screen in a second. You should see that

1 this is a -- you've seen 798 before; haven't you?

2 A. Yes, I have.

3 Q. This is a document that the FBI publishes on its web page,
4 right?

5 A. Yes.

6 Q. And the FBI actually -- the CJIS division actually
7 updated -- this isn't even the most recent document; is it?

8 A. I believe it's not. It's a monthly --

9 Q. Yeah.

10 A. Yes.

11 Q. And so the most recent edition is from March of 2021;
12 right?

13 A. That's correct.

14 Q. And what this document, PEX 798, shows is the reasons why
15 the NICS section denies a firearm purchase in a background
16 search; right?

17 A. Correct.

18 Q. You can see, from 1998 to 2021, the NICS section has
19 denied nearly a million felony convictions; right?

20 A. Some of them are not felonies.

21 Q. I'm sorry. That's not the one that I wanted to show.
22 It's paragraph 1.

23 A. Yeah. Yeah.

24 Q. You see paragraph 1. And you can see --

25 A. Yeah.

1 Q. -- the NICS section has denied nearly a million felony
2 convictions; right?

3 A. Yes.

4 Q. And I also want to show you paragraph 4.

5 You see paragraph 4, the NICS section has denied nearly
6 200,000 misdemeanor crimes of violence; right?

7 A. Correct.

8 Q. Isn't it fair to say that all of those million-plus
9 people, just like Devin Kelley, lied on their ATF forms?

10 A. That's correct.

11 Q. And all of those million-plus people were prevented from
12 getting a gun, by the NICS section, by denying them to the
13 FFL; right?

14 A. I can't say "prevented." We provide a denial to the FFL.
15 It is up to the FFL to make that final determination.

16 Q. And you expect the FFLs to follow the law; don't you?

17 A. We do -- we do expect that.

18 Q. And if --

19 A. And in some cases, it doesn't. But in the majority, yes.

20 Q. And if they're following the law, they are denying over a
21 million guns to felons and child abusers; right?

22 A. Yes.

23 MR. JACOB: Pass the witness, Your Honor.

24 THE COURT: Anything else?

25

RECROSS-EXAMINATION

BY MR. STERN:

Q. Taking a look at Joint Exhibit 798 again.

MR. STERN: I'm sorry. It might be Plaintiffs' Exhibit 798. It was renamed; right?

(Discussion off the record)

BY MR. STERN:

Q. This was the federal denials form that plaintiffs' counsel just showed you; is that correct?

A. That's correct.

Q. NICS is successful in its mission; correct?

A. Yes.

Q. But within the limitations of the law as set forth by Congress?

A. Correct.

Q. And you don't know how many of these individuals were able to obtain firearms through non-FFLs; do you?

A. We do not.

Q. And as you've said before, it's basically individual by individual?

A. That's correct.

Q. Whether or not someone had the requisite intent to obtain firearms through any means possible?

A. That's correct.

Q. Take a look at Joint Exhibit 20. Take a look at this

1 distribution list that plaintiffs' counsel was referring to.

2 In fact, there were ten entities that were informed about
3 the result of trial; correct?

4 A. Yes.

5 Q. Not all ten of these are required to submit a final
6 disposition to -- to NICS; are they?

7 A. At the time of arrest and at the time of a disposition.

8 Q. Well, he was suggesting that the Security Forces had the
9 obligation. But are you aware of testimony by Colonel Ford
10 that said it was the -- it was the investigative agency that
11 actually leads to the conviction that had the obligation to
12 submit to NICS?

13 A. Yes.

14 Q. So, again, even if Security Forces Squadron was one of ten
15 entities that got the result of the trial, that doesn't
16 necessarily obligate them to submit to NICS; does it?

17 A. No.

18 THE COURT: But just so I'm -- just so I know the
19 government's position: Who was required to submit to NICS?

20 THE WITNESS: It's actually the entity that made the
21 arrest and took the fingerprints.

22 THE COURT: And so who is that in this case?

23 THE WITNESS: I'm not -- I'd have to look back at the
24 document to see the specific, but I believe it's the
25 investigating agency.

1 MR. STERN: Correct. The investigating agency that
2 led to the actual conviction?

3 THE WITNESS: Yeah.

4 MR. STERN: Which would not be Security Forces.

5 THE COURT: So in nebulous government world, there's
6 a whole bunch of agencies.

7 MR. STERN: Not --

8 THE COURT: Who is the agency in this case?

9 MR. STERN: Air Force Office of Special
10 Investigations, OSI, which is a different component than SFS,
11 which is Security Forces Squadron.

12 So the only purpose with regards to showing the letter of
13 referral -- I'm sorry -- the letter of reprimand was that
14 Security Forces' investigation ended with a letter of
15 reprimand, thereby, not prohibiting Devin Kelley from owning
16 or possessing firearms under the Gun Control Act.

17 THE COURT: So then, to be clear, in Joint Exhibit
18 20, Air Force Office of Special Investigations Detachment 225
19 was the investigating authority, and they received a copy of
20 this report of conviction; correct?

21 MR. STERN: Correct.

22 THE COURT: Okay.

23 THE WITNESS: Yeah.

24 MR. STERN: Correct.

25 But, again, not all ten entities --

1 THE COURT: No. I got that.

2 MR. STERN: Then I'll move on. Then I'll move on.

3 Okay.

4 BY MR. STERN:

5 Q. Devin Kelley was not prohibited from owning or possessing
6 a firearm at this time (indicating)?

7 A. That's correct.

8 Q. He was not prohibited from owning or possessing a firearm
9 at this time (indicating)?

10 A. Correct.

11 Q. He was not prohibited from owning or possessing a firearm
12 at this time (indicating)?

13 A. Correct.

14 Q. He was willingness -- he was willing to subject himself to
15 up to ten years imprisonment to obtain a firearm at this time
16 (indicating)?

17 A. He was.

18 Q. He was willing to subject himself to ten years
19 imprisonment at this time, to obtain firearms (indicating)?

20 A. Yes.

21 Q. He was denied at an FFL; correct?

22 A. That's correct.

23 Q. And continued to try to obtain firearms?

24 A. Yes.

25 Q. He subjected himself to ten years imprisonment to obtain

1 firearms at this time (indicating)?

2 A. Yes.

3 Q. He subjected himself to ten years imprisonment to obtain
4 firearms at this time (indicating)?

5 A. Correct.

6 MR. STERN: No further questions, Your Honor.

7 MR. JACOB: May I, Your Honor?

8 THE COURT: Yes.

9 MR. JACOB: Briefly.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. JACOB:

12 Q. Ms. Del Greco, Mr. Stern talked about how he was denied at
13 Dick's. Do you remember that conversation?

14 A. I do.

15 Q. Between the attempted purchase at Dick's -- or after the
16 attempted purchase at Dick's, you know that Devin Kelley went
17 to an FFL to purchase his gun; right?

18 A. Correct.

19 Q. Do you have any evidence to suggest, between November 2015
20 and his purchase of this AR in April of 2016, that Devin
21 Kelley went to a gun show and bought a gun?

22 A. I have no knowledge of that.

23 Q. Do you have any evidence to suggest, between the Dick's
24 denial and his AR purchase, Devin Kelley built a ghost gun?

25 MR. STERN: Objection. Speculation. Asked and

1 answered.

2 THE COURT: She's representing the FBI here. So she
3 can ask -- she's answering, I believe, as the representative
4 of the FBI; right?

5 MR. JACOB: Yes, Your Honor.

6 THE COURT: And so your answers are, does the FBI or
7 you know whether any evidence exists that you-all are aware
8 of?

9 THE WITNESS: No.

10 MR. STERN: Your Honor, I do want to be clear,
11 because she is a representative of the FBI as a 30(b)(6)
12 witness as it relates to NICS, not with regards to the
13 investigative file of the Texas Rangers that was supported by
14 the FBI. So she's not here to testify on behalf of the FBI
15 at-large.

16 THE COURT: I understand that now.

17 MR. STERN: Thank you.

18 THE COURT: Go ahead with your questions.

19 BY MR. JACOB:

20 Q. Ms. Del Greco, do you have any evidence to suggest that
21 between his denial at Dick's and his purchase of this AR in
22 2016, Devin Kelley built ghost guns or borrowed a gun or got
23 any guns through a non-FFL source?

24 A. I'm not aware.

25 MR. JACOB: Pass the witness, Your Honor.

1 THE COURT: Anything else?

2 MR. STERN: Nothing, Your Honor.

3 THE COURT: Any further need for this witness, or can
4 she be excused?

5 MR. JACOB: One moment, Your Honor.

6 MR. ALSAFFAR: One moment, Your Honor.

7 *(Discussion off the record)*

8 MR. JACOB: Your Honor, we do have one more question
9 for Ms. Del Greco. I apologize.

10 THE COURT: Go ahead.

11 MR. JACOB: We're just cueing up a clip.

12 BY MR. JACOB:

13 Q. Ms. Del Greco, you talked to Mr. Stern about the --
14 Colonel Ford's testimony; right?

15 A. Yes.

16 Q. I'd like to show you, actually, what Colonel Ford
17 testified to on that matter. And I'm going to be playing --
18 okay. We're showing the transcript, page 171 through 172.

19 Do you see line 21 on page 171?

20 A. Yes.

21 Q. He's asked the question: "So this is a mandatory
22 instruction, that once law enforcement agency and DoD Security
23 Forces receives the notification from the SJA on the final
24 disposition of military judicial action, they must send the
25 R-84 to the FBI within 15 days."

1 And on the next page the question is, "Correct?"

2 Do you see that?

3 A. I do.

4 MR. STERN: Objection.

5 Q. How did --

6 THE COURT: What's the objection?

7 MR. STERN: Vague. "They are." The distribution
8 list, she already testified that not all ten -- or at least
9 she doesn't know whether all ten who receive this result of
10 trial need to submit to NICS.

11 THE COURT: So that's not the question pending.

12 So ask your question.

13 BY MR. JACOB:

14 Q. The question is: He answers, "Yes, that's correct"; isn't
15 that true, Ms. Del Greco?

16 A. I see that on the slide, yes.

17 Q. He answers that the Security -- when the Security Forces
18 receives the notification of the results of trial, as you
19 discussed with Mr. Stern, from the SJA on final disposition,
20 they must send the R-84 to the FBI. Is that true?

21 THE COURT: Now, are you asking for her personal
22 knowledge, or are you asking for what -- is that on the
23 screen?

24 MR. JACOB: This is impeachment, Your Honor. They
25 used this witness to try to --

1 THE COURT: My question to you is: Are you asking
2 her whether that's correct, or are you just asking her if
3 that's a correct recitation from the page?

4 MR. JACOB: I'm asking her if it's correct, Your
5 Honor, from her knowledge.

6 THE COURT: So can you answer that question?

7 THE WITNESS: I know that the Department of Defense
8 has an MOU with the FBI to submit timely final dispositions to
9 the NICS. Beyond that, within their own department, I do not
10 know what their specific rules are.

11 THE COURT: So as to the memorandum of understanding,
12 it's your understanding of that MOU that they're supposed to
13 send these notice of finals within 15 days?

14 THE WITNESS: Yes.

15 THE COURT: Your next question.

16 MR. JACOB: Your Honor, that was the point that I was
17 making. I'll pass the witness.

18 THE COURT: Anything else?

19 FURTHER RECROSS-EXAMINATION

20 BY MR. STERN:

21 Q. Is it clear from this transcript who "they" are in terms
22 of the obligation to submit to NICS?

23 A. No.

24 MR. STERN: Thank you.

25 THE COURT: Well, just to make sure I'm understanding

1 things, then -- I mean, I thought we'd already cleared this
2 up. I thought it was the Air Force OSI Detachment 225 who
3 received that final notice. It was their obligation, pursuant
4 to the MOU, to send to NICS within 15 days that final
5 disposition.

6 THE WITNESS: Yes. It would be unusual for us to get
7 it ten times.

8 THE COURT: Right. I'm just worried about AFOSI
9 Detachment 225.

10 THE WITNESS: Yes.

11 MR. JACOB: And, Your Honor, my point was that that's
12 the government's position, and it's an incorrect position
13 based on the testimony and the instructions.

14 MR. STERN: We can clean this up in post-trial
15 briefing as well because we have the depositions already
16 designated and in the record. I don't think it's necessary to
17 belabor the point with this witness.

18 THE COURT: Right. Yeah. So we're here just with
19 this witness. I've asked the questions I think I need out of
20 her. Do you have any further questions for this witness?

21 MR. JACOB: No, Your Honor.

22 THE COURT: Does the government have any further
23 questions from this witness?

24 MR. STERN: No, Your Honor.

25 THE COURT: May she be excused?

1 MR. JACOB: Yes, Your Honor.

2 MR. STERN: Yes, Your Honor.

3 THE COURT: Thank you, ma'am. You're excused.

4 THE WITNESS: Thank you. Thank you.

5 THE COURT: So 11:37. What do you-all want to do?

6 Do you want to start your next witness? You want to break for
7 lunch?

8 MR. ALSAFFAR: I think it would make sense to break
9 for lunch. This is the start of the remote witnesses, Your
10 Honor. And it probably -- I believe the tech staff would like
11 to make sure that we've got everything going. And we can use
12 that time.

13 THE COURT: Okay.

14 MR. ALSAFFAR: If that's okay, Your Honor.

15 THE COURT: Yeah. That's fine with me. So he is by
16 Zoom.

17 How long do you think this witness is going to be taking?

18 MR. ALSAFFAR: This is going to be the last witness
19 of the day by agreement with the government.

20 THE COURT: Right.

21 MR. ALSAFFAR: And it's an expert witness. So I
22 think it'll be a few hours. But we will be done with this
23 witness today, I believe.

24 THE COURT: Okay. So...

25 MR. ALSAFFAR: Don't want to commit --

1 THE COURT: 11:00, basically --

2 MR. JACOB: Come on, Paul. You can commit.

3 THE COURT: It's 11:40. Is 12:30 enough time for
4 everyone? 12:30.

5 MR. ALSAFFAR: Oh, yes, Your Honor. Thank you.

6 THE COURT: So let's resume by Zoom at 12:30.

7 *(Recess)*

8 *(Change in reporter)*

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1 (Change in reporter.)

2 THE COURT: Your next witness.

3 MR. ALSAFFAR: Thank you, your Honor. Plaintiffs
4 call, via remote, Colonel Larry Youngner.

5 (LARRY YOUNGNER, having been duly sworn, testified as
6 follows:)

7 THE COURT: You may continue.

8 MR. ALSAFFAR: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. ALSAFFAR:

11 Q. Colonel, first of all, if you don't mind, I'm just going
12 to do a little technology check, because you do have the honor
13 of being our first remote witness in this trial.

14 So can you -- first of all, can you hear me okay?

15 A. Yes, I can.

16 Q. Okay. Can you see us okay?

17 A. Yes, sir. I have four -- actually, let me check this
18 again, if I've got this maximized.

19 Yes, I have a view of the courthouse, of the government
20 table, the plaintiffs' table, and then myself.

21 Q. Okay. Well, that should do it. That should do it.

22 Colonel, would you mind stating your name for the record.

23 A. Sure. Larry Douglas Youngner Jr., Colonel, United States
24 Air Force, retired.

25 Q. Colonel, I'd like to take the judge through a little bit

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1 about your background. I won't go through all of it, because
2 I know it's extensive, but I would like to highlight some key
3 points.

4 MR. ALSAFFAR: And, Your Honor, Colonel Youngner's CV
5 has been admitted into evidence as JEX 614.

6 THE COURT: Thank you.

7 MR. ALSAFFAR: And I've also provided you with his
8 witness notebook on the bench, Your Honor.

9 BY MR. ALSAFFAR:

10 Q. Colonel, tell us a little bit about your educational
11 background.

12 A. Yes. I attended the University of Georgia for
13 undergraduate in 1983. That same year, I was commissioned as
14 an infantry officer in the Army Reserve, and I drilled with a
15 reserve unit while on educational delay to attend law school
16 at the University of Georgia.

17 My next degree was earned in 1986 with a jurist doctorate
18 from the University of Georgia. Related to that, I was able
19 to take the bar as a third-year student in February, under
20 Georgia rules at the time. And I passed the bar prior to
21 graduation from law school that May of 1986, and then I
22 entered active duty.

23 Back to education, I obtained a LIM degree from the
24 Army -- we call it the Army JAG. So it's now the Judge
25 Advocate General's Legal Center and School. It's an

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1 ABA-accredited law school co-located with the University of
2 Virginia. That was 1998. My LLM was in military law with a
3 specialty in international operations law.

4 The last educational experience I had was at National
5 Defense University where I obtained a master's degree in
6 national resource strategy. It's now called the Eisenhower
7 School. It used to be called the Industrial College of the
8 Armed Forces. And that was in 2006.

9 Q. And, Colonel, since we're remote and you're the first
10 witness, I'm just going to test your screen to make sure that
11 you can see the documents okay.

12 And while you were talking about your background, I put up
13 a part of your CV, which is JEX 614.

14 Can you see that okay? Is that clear to you?

15 A. Yes, sir. I saw a page pop-up, and then I saw a block
16 expand while I was answering your question, sir.

17 Q. Okay. Thank you.

18 And we can take that -- we can take that down. Thank you
19 very much.

20 How many years did you serve in the military again?

21 A. Just at 31 years, from June of 1983 until I retired in
22 July of 2014. Six of those years were in the Army, just over
23 six. And just under 25, about 24 1/2, were in the Air Force.

24 The last 24 1/2 was as an Air Force judge advocate. I was
25 an active member of the State Bar of Georgia since 1986, but I

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1 was not practicing as an attorney from 1986 through 1989. I
2 did not begin my legal practice in earnest until 1989 as an
3 Air Force judge advocate.

4 Q. Thank you, Colonel. And just to make things, hopefully, a
5 little smoother, every once in a while, I might put my hand up
6 like that. And if I do that, I may just be cueing you real
7 quick, if you could stop and let me ask a question or try to
8 break it up a little bit.

9 With this remote system, it's really hard for us to read
10 each other's cues. So I'm not trying to be rude when I do
11 that, but I thought that might be helpful for you.

12 Is that okay?

13 A. Yes, sir.

14 Q. All right.

15 A. Yes, sir.

16 Q. In your 24 1/2 years of service — thank you for your
17 service, by the way.

18 In your 24 1/2 years of service for the Air Force as a JAG
19 officer, about how many court-martials did you personally, as
20 legal counsel, complete?

21 A. All total, 40 courts-martial. As lead counsel, I want to
22 say 36. The first four cases, I was, if you will, second
23 chair to a more senior attorney while I — we had to get
24 qualified.

25 So I participated in 40. To answer your question

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1 precisely, as lead counsel, 36 of those 40.

2 Q. And how many courts-martial -- well, let me ask you this.
3 I didn't ask you this about command.

4 Did you ever serve in the command structure, at the
5 command level with the SJA, which is the judge advocate's
6 office for the Air Force?

7 A. Yes. I was the staff judge advocate several times in my
8 career from insulation level up to the major command level.

9 Q. How many --

10 A. So I'd have to -- yes, sir.

11 Q. Oh, I'm sorry. I was just going to ask you just
12 approximately, if you know, how many courts-martials as a
13 command SJA did you oversee and supervise and -- supervise
14 while you were in the Air Force?

15 A. In the supervisory capacity, well over 300. I believe it
16 was around 390, 396. It's in my CV and report.

17 Q. Okay. As part of your job as both a JAG officer in the
18 Air Force as well as your 300 to 400 supervisory
19 courts-martials, was it part of your job to regularly review
20 security forces instructions and Air Force OSI instructions
21 during your career?

22 A. We would review those instructions for compliance, mainly
23 as issues developed in a case. If we spotted an issue, what
24 we really dug into -- so the short answer is yes, we would
25 review those.

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1 We would dig deeper if we saw we had a problem on a case
2 or a potential problem being able -- as a prosecutor, we want
3 to make sure we could handle all the elements of the offense,
4 that we had investigative sufficiency from either OSI or a
5 security forces office of investigations, depending upon which
6 one of the two agencies were doing the investigation.

7 But, yes, we would absolutely review OSI Manual 71-121.
8 The security forces had what they call a 31 series of AFIs
9 that governed security force matters.

10 And where we really got into the heart of it was on
11 actually digging into the case files as a prosecutor or as a
12 defense counsel.

13 Q. This case, as you know, involves security forces
14 instructions in the 31 table and the AFOSI security
15 instructions as well as the DODI.

16 Are those the types of instructions -- those specifically
17 as well -- that you would regularly review for investigative
18 case file sufficiency in your 30 -- almost 25 years in the
19 Air Force?

20 A. Yes, sir. We would review those. The DODIG instructions
21 would depend upon what type of investigation they were
22 conducting. There was a unit compliance inspection. I
23 believe it was 9201, and then 301 was the series for actual IG
24 investigations for fraud, waste, and abuse into a particular
25 matter.

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1 That would have been -- so, anyway, yes, sir.

2 And there were DOD equivalents, but I focused mainly on
3 the Air Force instructions.

4 Q. Okay. Did you also have occasion -- did the Air Force ask
5 you also to serve as a teacher to the AFOSI Academy at any
6 time?

7 A. Yes. When I was an area defense counsel and then later as
8 a circuit defense counsel -- the OSI Academy used to be at
9 Bolling Air Force Base before they ultimately went to the
10 Federal Law Enforcement Training Center down in Brunswick,
11 Georgia.

12 So I would conduct a class and then follow it up with a
13 mock trial. Where, as a defense counsel, I would
14 cross-examine OSI agent trainees. And then we'd do a debrief
15 afterwards to talk about what they could expect when they
16 testify for the first time.

17 It was to give them comfortable with having to come into
18 court, be sworn in, and answer questions on both direct exam
19 and cross-exam.

20 So, yes, sir, I did that several times while I was an area
21 defense counsel out at Andrews Air Force Base. And then it
22 continued when I was at Bolling as a next-level-up circuit
23 defense counsel, we called it at that time.

24 Q. Would you mind just providing the Court just a very quick
25 summary of the various command posts where you would advise

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1 AFOSI and security forces personnel on investigative
2 sufficiency in criminal investigations, the various posts
3 around the world that you've done that?

4 A. Sure. So working on the prosecution side at Bolling Air
5 Force Base as a lead counsel, trial counsel; then at
6 Rhein-Main Air Base in Germany as the deputy staff judge
7 advocate for a few months, then as the staff judge advocate;
8 at Seymour Johnson Air Force Base in Goldsboro, North
9 Carolina; while on deployment in Sarajevo; prior to that, in
10 Bosnia; and while deployed to Iraq in 2003, where I was a
11 staff judge advocate.

12 And then moving up at the next level was what we call a
13 numbered Air Force, at Ninth Air Force. So there I was
14 reviewing -- there, I was working more with the management
15 level. So we would talk to the field investigative region a
16 good bit.

17 So let me stop at that point.

18 I continued to work with OSI at Hurlburt Field as the
19 Air Force Special Operations Command staff judge advocate.
20 But, again, that was at a higher level or a more serious type
21 of investigation.

22 I really worked very closely with the DetCo or the
23 detachment commander of an Air Force Office of Special
24 Investigations detachment for their superintendent, which was
25 their senior enlisted supervisor. I worked with them most

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1 closely at Rhein-Main Air Base, at the 4th Fighter Wing at
2 Seymour Johnson Air Force Base in North Carolina, and then as
3 an initial trial counsel at Bolling Air Force Base.

4 Q. When you say you worked with DetCo and superintendents,
5 just so that we understand -- and I apologize if I don't, but
6 I want to sure we understand the terminology.

7 DetCo would be a detachment commander for a particular
8 detachment at an installation like Holloman Air Force Base?

9 A. Yes. The distinction -- and there is a difference. But
10 the DetCo is a commissioned officer; whereas, the
11 superintendent is a -- is usually a senior NCO, though there
12 could also be a GS, a senior civilian -- GS, say, 13 or 14.

13 In fact, for a while at Seymour Johnson, we had a GS-14,
14 who was a retired senior NCO who then got hired back by OSI
15 and worked as a very competent superintendent.

16 Q. Can I ask you now about a different area of experience
17 that you had in the Air Force?

18 A. Sure. Of course.

19 Q. Did you have any experience with advising or working with
20 inspector general investigations while in the Air Force?

21 A. Yes. And it falls parallel track, if you will. We try
22 not to cross the streams between IG investigations and
23 criminal investigations; though, it is quite often that an IG
24 investigation -- because they typically will get into fraud,
25 waste, or abuse of authority. And it is not unusual for an IG

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1 investigation to result when it's completed if substantiated
2 findings exist in a criminal case.

3 So back to your question. The IG work at base level at
4 Bolling was to mainly to review for legal sufficiency the
5 reported investigation that the IG was conducting. And I
6 accomplished that or I supervised as a staff judge advocate a
7 subordinate -- you know, a major or a captain -- who was
8 conducting that.

9 I reviewed their legal sufficiency. And at the higher
10 level, I had a major or lieutenant colonel draft that, say,
11 for example, at Air Force Special Operations Command at
12 Hurlburt Field, Florida.

13 But before it went into our commanding general, I read
14 through it and made sure it was legally sufficient. And if it
15 wasn't -- and on one occasion, we sent something back for
16 reinvestigation.

17 And I don't want to get into the nuts and bolts of it, but
18 I did do that every time I served as a staff judge advocate.
19 It's just the scope of the investigation was often larger.

20 I'll give you one example. At Hurlburt Field, there was
21 an allegation that the 1st Special Operations Wing had some
22 senior personnel that were taking extended brass --
23 105-millimeter Howitzer shells from our AC-130 gunships. And
24 they were basically selling the brass for profit instead of
25 turning it into the Defense Reutilization and Marketing

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1 Office.

2 So if we were going to look at such a serious accusation
3 against both military and contractors, we needed to make sure
4 that the i's were dotted, t's were crossed, so to speak.

5 So was there investigative sufficiency? Did it meet the
6 burden of proof in the case? Was there credible evidence to a
7 preponderance, in that standard? It wasn't a criminal case at
8 that point.

9 Q. And did you advise IG -- or sorry -- inspector generals
10 investigations at a variety of level of commands in the
11 Air Force?

12 A. Yes. I also -- at the Headquarters U.S. Air Force, my
13 final assignment, I was the chief of staff of the Air Force
14 JAG corps. And in that capacity, there were opportunities to
15 advise the IG either on -- we would review AFI regulatory
16 changes. So that was more of an administrative review.

17 And then occasionally there would be a case that we would
18 coordinate on. One example at the Headquarters Air Force
19 level was how to approach an alleged cheating scandal at the
20 OSI -- excuse me, at the U.S. Air Force Academy. And the
21 second one also involved an alleged cheating scandal among
22 nuclear surety officers.

23 Anyway, so those are cases that we worked with staff. So
24 the IG -- staff IG, the Secretary of the Air Force Inspector
25 General is a three-star position at the Headquarters

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1 Air Force. Underneath staff IG is both the inspection piece
2 of this and OSI.

3 So Headquarters Air Force OSI is a subordinate unit to
4 that three-star general. So at that level, we would advise
5 SAF IG where we -- what's the choice of forum for
6 investigation; should you keep this in IG channels, or should
7 you send it to OSI?

8 And that's the kind of advice I would give at the
9 air staff level in 2013 and 2014.

10 Q. Thank you, Colonel.

11 And your current practice -- your current private
12 practice, what does that focus on?

13 A. Currently, I am focused on military courts-martial
14 defense, national security clearance matters, and boards for
15 correction of records for either an inequity or an injustice
16 in -- identified in mainly officers' records, so officer grade
17 determinations and so forth. That's what I'm currently doing.

18 When I retired in 2014, I did join a firm. And with that
19 firm, I became a managing partner. So I had both supervisory
20 duties -- much like being an SJA again -- as well as consults
21 for the clients. And then I defended -- I then did three
22 court-martial defense cases as a civilian private practice
23 attorney between 2014 and 2020.

24 Q. Colonel, as part of your education and your Air Force
25 training, your Air Force service as well as your Air Force

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1 experience, did you regularly encounter, evaluate, and analyze
2 DOD instructions, Air Force instructions, security forces
3 instructions, IG investigations, IG reports relating to
4 criminal investigations?

5 A. Yes, sir.

6 Q. As part of your education, Air Force training, Air Force
7 service, and experience, did you encounter and analyze
8 instructions that are — that are forming the basis of this
9 case, DODI 5505.11, Air Force Instruction 71-121, and
10 Air Force Security Forces Instruction 31-205 and 206?

11 A. Yes, sir. I actually think it's OSI Manual 71-121. But,
12 yes, sir, I did. And related handbooks and instructions
13 within OSI.

14 Q. Thank you. Thank you.

15 As part of your education, Air Force training, Air Force
16 service, and experience, did you evaluate and analyze the
17 compliance requirements for Air Force criminal investigations,
18 inspector general investigations, and the consequences of
19 those compliance failures?

20 A. Yes, sir. Primarily on cases that we were reviewing for
21 investigative sufficiency or legal sufficiency. But then
22 also, just from a broader perspective, you had to make sure
23 that if, say, there was an IG investigation that you followed
24 up and complied with the findings and recommendations that you
25 agreed to.

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1 Q. And turning to this case and the opinions that you formed
2 in this case, did you apply the same methodology, the same
3 rigor, the same process that you applied in your 24 1/2 years
4 of Air Force experience investigating and working and
5 prosecuting and defending and supervising Air Force criminal
6 investigations?

7 A. Yes, sir, the same rigor and the same methodology.

8 Q. And in forming those conclusions, did you arrive at your
9 conclusion within a reasonable degree of certainty within your
10 field of expertise?

11 A. Yes. Yes, I did.

12 Q. Can you -- and I -- I know that we have asked you to
13 review tens and tens of thousands of documents in this case.

14 But if you don't mind, can you provide just a sort of
15 bullet-point list of the types of documents and information
16 that you reviewed in forming your conclusions in this case?

17 A. Yes, sir. So to begin with, I reviewed all the DODIG
18 reports that had been provided to me. I reviewed depositions
19 of all the Air Force personnel, to include -- well, let's see.
20 There were case agents, supervisors, commanders. There were
21 designated representatives from agencies like at NICS or for
22 the Air Force. I think Colonel Ford represented security
23 forces, for example.

24 But basically every witness deposition and all of the
25 associated exhibits that were related to that deposition. So

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1 if Special Agent Holz, for example, is called as a witness, I
2 looked at every exhibit that was produced as part of that.

3 As far as files, that included the Det 22 -- the OSI
4 Detachment 225 at Holloman had an investigative file. The
5 security forces -- the 49th Security Forces Squadron had their
6 files. The Logistics Readiness Squadron, the 49th LRS, had
7 a -- what we call a PIF, a personnel information file.
8 Basically, it's a list of issues typically that concerned
9 Devin Kelley.

10 Let's see. I looked at the Texas Ranger Snyder
11 deposition, all of his files, which were extensive.

12 There were DOD -- I mentioned the reports, but there were
13 instructions from DOD, Air Force, Air Force OSI. And then I
14 think the last area would be the defense expert reports.
15 Typically, there was a report and a supplemental report for
16 each of their experts, I believe. I think there were five in
17 total.

18 Q. Colonel, the type of information that you just went
19 through -- and including the full breadth of the information
20 you actually did review that I know is detailed in your
21 report -- is this the type of information and data an expert
22 in your field would reasonably rely upon in forming their
23 conclusions in cases?

24 A. Yes, sir, it is. You want to look at the collective
25 facts. You want to look at the evidence. You want to look at

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1 the rules and regulations that were applied.

2 MR. ALSAFFAR: Your Honor, we'd like to offer
3 Colonel Youngner as an expert in Air Force criminal
4 investigations, IG investigations, and oversight within the
5 Air Force, Air Force protocols in criminal investigations and
6 SJA responsibilities.

7 THE COURT: Any objection?

8 MS. CHRISTILLES: Your Honor, we don't object to
9 Colonel Youngner testifying on matters concerning Air Force
10 protocols and staff judge advocate responsibilities. To the
11 extent that Colonel Youngner will provide testimony outside of
12 those areas of expertise, we would object, as fully briefed in
13 the government's motion to exclude, which is at Docket 352.
14 And we're basing that on the report and supplemental report of
15 Colonel Youngner.

16 So at this point, Your Honor, I think that the best
17 way to proceed is to not voir dire the witness but to let
18 counsel proceed and then allow us to cross-examine the witness
19 on his qualifications, unless Your Honor would prefer voir
20 dire at this point.

21 THE COURT: No. So I'm ready to rule on that. The
22 motion -- the government's motion is denied. Colonel Youngner
23 is recognized as an expert in those three fields.

24 However, on the government's many motions -- or many
25 objections as to ultimate conclusions of law that

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1 Colonel Youngner has expressed, I'll exclude those ultimate
2 conclusions as I review his reports. And I'll entertain any
3 objections he makes during his testimony today if it arises in
4 that area.

5 MR. ALSAFFAR: We will follow that closely. Thank
6 you, your Honor.

7 BY MR. ALSAFFAR:

8 Q. Okay. Colonel, I'd like to now start digging into -- into
9 the Devin Kelley case and your opinions in the case.

10 And if you don't mind just briefly providing us a little
11 bit of background in sort of how this all started in terms of
12 the DOD and Air Force recording -- sorry -- reporting
13 requirements related to fingerprint submission and criminal
14 history or also referred to as final disposition reporting.

15 A. Yes, sir. So I -- well, sir, I hate to tell you what time
16 it is by how to build a clock, and so I apologize to the
17 Court. And please stop me if I go too far on this.

18 It starts with the Gun Control Act of 1968. Congress
19 recognized that we needed a comprehensive scheme to ban
20 prohibited persons from obtaining, possessing, transferring,
21 selling firearms.

22 The next major muscle movement was what I'll call
23 colloquially the Brady Act. I believe it's the Handgun
24 Violence Protection Act. And basically that required use of
25 NICS. And government agencies, to include the DOD and the

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1 U.S. Air Force, were required to submit data to the FBI
2 National Instant Criminal Background Check System.

3 And then the third major muscle movement was the
4 Lautenberg Amendment, which focused on domestic violence and
5 adding them under 18 U.S. Code 922, I believe (g), there's a
6 category for as low as a misdemeanor-level domestic violence
7 offense.

8 My understanding is that the intent of Congress was to
9 further protect those, you know, victims of domestic violence
10 and to prevent future offenders from obtaining a weapon.

11 MR. ALSAFFAR: Okay.

12 THE WITNESS: I see counsel stood up.

13 MS. CHRISTILLES: Your Honor, I would just object to
14 Colonel Youngner testifying about any of the federal laws.
15 Again, he's been qualified in Air Force protocols and
16 responsibilities.

17 THE COURT: So the two go in tandem. But at this
18 point, he's just reciting what laws have already passed. I
19 can read the congressional intent by reading the 922 language
20 myself.

21 MS. CHRISTILLES: Yes, Your Honor.

22 THE COURT: So let's move him along.

23 MR. ALSAFFAR: We are. A brief summary, Your Honor.

24 BY MR. ALSAFFAR:

25 Q. I'd like, Colonel, to sort of in that context relating to

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1 the DOD IG history as it relates to this case -- and what I'm
2 talking about is the -- and I don't want to go -- we've
3 already gone -- established, and it's not in dispute, about
4 what those reports say and what they do.

5 But just by way of background in terms of framing the
6 issue that I want to talk to you about today, which is the
7 supervisory issues and responsibilities, if we could just
8 briefly -- if I could just show you -- well, before I show you
9 this.

10 Just generally -- just generally, what was the -- in your
11 opinion, what was the purpose of the various DODIG, inspector
12 general, reports regarding the Air Force's failures over the
13 decades to report fingerprint submissions and criminal history
14 data like they did in this case?

15 A. So the purpose was to look at compliance with the
16 duty-to-report criminal history data. Those three legislative
17 acts that I talked about required fingerprint data on an
18 FD-249 and a final disposition report on a Form R-84.

19 And the question was: Was the OSI and the security
20 forces, where required under the law and under the
21 implementing DOD Instruction 5505.11 and the Air Force
22 instructions, were they compliant?

23 And the gist of those reports were they were not complying
24 or there were misses. In fact, at one point -- and that
25 started in 1997. There was a major --

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1 Q. Let me stop you since we're talking about -- and I'm going
2 to show JEX 14.

3 And, Colonel, whenever I say -- and I apologize. I should
4 have told you this. Whenever I say "JEX," that is an exhibit
5 number. That means that the exhibit is already part of
6 evidence. It's been admitted into evidence, just so you
7 understand the terminology.

8 I think you've been working with Bates numbers for a long
9 time --

10 A. Right.

11 Q. -- but we're now transitioning to trial exhibit numbers.
12 I'm showing you JEX, since you mentioned it, 14.

13 And is that the 1997 IG report you just referenced?

14 A. It is. I believe it's the one that Ms. Eleanor Hill, as
15 the DODIG, complied with the requirement -- the congressional
16 requirement to do this report.

17 Q. Okay. And what was the -- just a quick summary. We'll
18 just say what was the ultimate conclusion in terms of the
19 Air Force's failure rate dating back to 1997 in reporting
20 criminal fingerprint history and criminal conviction history?

21 A. Around -- well, first of all, the discovery was made that
22 defense criminal investigating office agencies, organizations
23 such as OSI, CID for the Army, and NCIS were reporting. But
24 they were missing, in the Air Force, around 35 to 40 percent,
25 around 38 percent, of their fingerprints, and I believe about

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1 50 percent of the final disposition reports. And those
2 findings were published in there.

3 The other major, you know, lightbulb that went off here
4 was that, you know, law enforcement organizations that would
5 also take fingerprints weren't submitting anything or found
6 disposition reports. By that, I mean the military police, the
7 security forces, and the Navy shore patrols.

8 Q. I want to ask you a quick question, because it was brought
9 up with one of the witnesses this morning for the FBI. And I
10 don't know, Colonel, when you were preparing for this, if you
11 were able to see.

12 But were you able to see the FBI deputy director testimony
13 this morning?

14 A. I probably caught about ten minutes of, I believe,
15 Ms. Del Greco's testimony.

16 Q. That's right.

17 A. But that's all that I --

18 Q. And you reviewed her deposition testimony; correct?

19 A. Oh yes, I did.

20 Q. The reason I asked you is because I wanted to ask you
21 about something that came up, and that was regarding the
22 security forces.

23 Because you mentioned in 1997, the inspector general
24 pointed out that the military law enforcement organizations,
25 which include the security forces, not just OSI -- but the

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1 security forces were also failing at a high rate to report
2 this criminal data.

3 Is that a fair summary?

4 A. Yes, sir. That's a fair summary.

5 Q. All right. And then after that, after 1997, at that point
6 were the security forces specifically -- or tell us -- tell me
7 what the security forces specifically did to get roped into
8 the mandatory instruction and compliance requirements to
9 report this data to the FBI?

10 A. Well, the short answer is Ms. Hill, the DODIG at the time,
11 in coordination with the secretary of defense and the service
12 secretaries, agreed to promulgate a new instruction that would
13 require all the law enforcement organizations to submit when
14 the trigger events occur, if you will, when the criteria is
15 met, submit fingerprints and final disposition reports.

16 Q. Okay. I want to fast-forward -- so that -- and that
17 applied to both -- did I hear you correctly? -- both OSI
18 detachments in the Air Force and security forces as well?

19 A. At that point, yes, sir.

20 Q. Okay. So I want to fast-forward to about -- I was told
21 there would be no math -- about 17 years, 2014, and show you
22 Joint Exhibit 111.

23 And if we go to -- while I'm finding the page -- I
24 apologize.

25 Colonel, can you tell us what the conclusions were related

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1 to the Air Force reporting criminal data for the last 10 years
2 to the FBI and the 10 years prior to this report?

3 A. The gist of that, as I recall, is about 10 years' worth of
4 data had not made its way to NICS. The discovery here -- the
5 next lightbulb to go off was just because you submitted
6 something to DIBRS, the Defense Incident-Based Reporting
7 System -- I apologize for the acronyms -- that -- that data
8 didn't make it to the FBI.

9 And I believe the OSI commander at the time -- and the
10 bottom line is the Air Force agreed with the findings and
11 recommendations to fix this. One of the fixes the Air Force
12 put in was a checklist that would become mandatory for use, at
13 least within OSI. And my understanding is security forces
14 would be implementing an instruction change in the 31 series
15 for investigative processes as well.

16 Your question about --

17 Q. Well, let me -- I think you answered it. And we're
18 showing the conclusion up on the screen.

19 Can you see it there, Colonel?

20 A. Yes, sir.

21 Q. Okay. So we talked about 1997, Air Force is being told
22 they're failing at a 38 to 50 percent rate for this data.

23 Fast-forward 17 years, they're being told, for the last
24 10 years, we're still not getting this stuff to the FBI.

25 I'd like to now go to the following year, 2015, which is

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1 JEX 1.

2 Can you see that? Can you tell us what that is?

3 A. Yes. So it's another DODIG investigation, specifically on
4 compliance with criminal history data reporting requirements.
5 That would be the fingerprint cards and the final disposition
6 reports and look at all the services, both their OSI, if you
7 will, for the Air Force and security forces office of
8 investigation.

9 Q. So in 2015 -- let's talk about just the Air Force --

10 A. Yes, sir.

11 Q. -- the failure rate on submission of fingerprint data to
12 the FBI. I'm going to show you page 13 of JEX 1.

13 A. Okay.

14 Q. And what was the conclusion on the failure rate for
15 Air Force fingerprint analysis in 2015?

16 A. Sure. What you're looking at there, you know, shows
17 approximately a 30 percent failure rate on the fingerprint
18 submission data.

19 Q. Okay. And let's go to page, JEX, 16. This is regarding
20 final disposition report failures, which would be -- that's
21 criminal conviction information; is that right, Colonel?

22 A. Right. Well, yeah. That was final disposition of a case.
23 So whatever that -- I mean, it could have been an acquittal.
24 But in most instances, there's a high rate of conviction.

25 So -- and it was about the same -- oh, there it is. So

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1 you're looking at, again, about 30 percent, maybe slightly
2 higher.

3 Q. All right. So at the point of the -- of the Devin Kelley
4 investigation in the mid-2000s, going forward, how would you
5 describe the Air Force's compliance with the mandatory
6 requirements to submit fingerprint data to the FBI as well as
7 criminal history data?

8 And what I mean by "how would you describe it," was it
9 tracking closely? Was it way off? Was it systemic? How
10 would you describe it?

11 A. Well, I've described it in my report as a systemic
12 failure. It varies. And it varies between OSI and security
13 forces. There were times when OSI would improve, and then
14 there are times when they would not improve. And that was
15 born out, frankly, all the way through the 2018 report, which
16 we haven't talked about, and the task force that OSI created
17 on criminal history data.

18 Q. Well, I want to --

19 THE COURT: One second.

20 MR. ALSAFFAR: Oh, I'm sorry. I didn't hear
21 anything.

22 MS. CHRISTILLES: Your Honor, it sounds like
23 plaintiffs' counsel is going through the issue of duty. I
24 think the Court has already ruled on that.

25 MR. ALSAFFAR: If I may respond, Your Honor.

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1 We're not going to address this in terms of duty
2 because, obviously, the Court has already ruled on this. This
3 is actually just going directly into the scope of supervisory
4 awareness and how that failure to grapple with the facts that
5 were going on fed down to the supervisory level.

6 THE COURT: That's the only way I'm receiving this.

7 MR. ALSAFFAR: Okay. Thank you, your Honor.

8 BY MR. ALSAFFAR:

9 Q. Because of what was mentioned this morning from the FBI
10 deputy director, Del Greco, I wanted to just show you the IG
11 report of 2017, which has been admitted as Joint Exhibit
12 Number 2. And what I'm talking about, Colonel, is the
13 security forces.

14 The security forces were not -- were they ever exempt
15 after 1997 from reporting final disposition reports when they
16 were informed in writing of a final disposition report
17 relating to military personnel that they were part of the
18 investigation on?

19 A. Short answer is no, they were not exempt. The longer
20 answer is you may have investigative responsibility that's
21 shared, or you may even have two separate offenses.

22 In my experience, I've had a military criminal accused who
23 was being investigated by OSI for certain offenses, because
24 there is a regulatory split between types of cases that OSI
25 will take -- regulatory within the Air Force and security

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1 forces.

2 We preferred, as staff judge advocates, to have one agency
3 handle everything. But it is -- it has happened that at times
4 both will investigate the same person for different offenses,
5 and both will continue to have an obligation to submit
6 fingerprint data if the trigger requirements criteria for
7 submission are met. And both could have a requirement to
8 submit a final disposition report again if those requirements
9 are met.

10 And I would -- well, no, I'll stop there. So that answers
11 your question.

12 Q. In this 2017 report -- first of all, what data years were
13 they actually evaluating, if you know?

14 A. Yeah, I do know. I'd have to check my notes again for the
15 specific dates, but it was sometime in 2015 -- I want to say
16 October -- to approximately December of 2016.

17 Q. What -- just to wrap this up.

18 What was the security force -- the DODIG conclusion about
19 the security forces', specifically, failure rate in this
20 report to submit criminal history data and final disposition
21 reports that they're aware of?

22 A. I think they were hitting about 60 percent noncompliance.

23 Q. All right. Now -- and let's -- just to be clear, let's
24 show you page -- this is Joint Exhibit 2 that's in front of
25 you, but let's go to page 39. I think you actually remembered

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1 correctly, but let's just show you page 39 from the IG report
2 relating specifically to the security forces, that finding.

3 Do you see it there?

4 A. Yes, sir, that's it. Yeah, 93. Okay.

5 Q. So the IG was telling the security forces that not only
6 were you failing at a 60 percent clip to submit criminal
7 history data but you were failing at a 60 percent clip to
8 submit fingerprint cards too?

9 A. As I recall, that year, it was the identical number of
10 both fingerprints and FDRs.

11 MR. ALSAFFAR: Okay. You can take it down. Thank
12 you.

13 BY MR. ALSAFFAR:

14 Q. Now, going back now to this case. You know, these -- all
15 of these various IG investigations reports over the prior
16 25-plus years -- when I say "prior," I mean to the years prior
17 to this shooting.

18 In terms of supervising agents on the ground, can you
19 explain, based on your review of this case and your experience
20 working with IG investigators yourself -- investigations
21 yourself, why is it that these IG reports never got pushed
22 down to the Detachment 225 and the 49th Security Forces Wing
23 at Holloman Air Force Base where Devin Kelley was?

24 A. Assuming that they weren't pushed down -- I don't know
25 that they weren't. One answer immediately is they were

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1 ignored; they were pushed, and it's just there was a bigger
2 concern.

3 The more direct answer, I believe, is a human factor. And
4 that's the -- I'm sorry. I see the counsel stood up.

5 MS. CHRISTILLES: Objection. Speculation, Your
6 Honor.

7 THE COURT: Yeah. Has he done any independent
8 investigation on any of this?

9 MR. ALSAFFAR: Not independent. Just the records of
10 the case and the outside -- and, of course, the IG
11 investigations, Your Honor.

12 THE COURT: So he's just repeating the IG's reports
13 that are already in evidence?

14 MR. ALSAFFAR: No, I don't think he's repeating. No,
15 no. We're actually going to get into specifically why it went
16 down to the detachment level.

17 THE COURT: What I'm trying to get at is how does he
18 know any of this? So he doesn't have personal knowledge.

19 MR. ALSAFFAR: Of course not. Yes, he was not there.
20 He's an expert reviewing the records, yes.

21 THE COURT: That's what I'm trying to get at. There
22 is underlying evidence that's supporting his statements?

23 MR. ALSAFFAR: Yes. Yes.

24 THE COURT: Go ahead.

25 MR. ALSAFFAR: I'm sorry. I misunderstood.

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1 BY MR. ALSAFFAR:

2 Q. All right. Now, when we're talking about this supervisory
3 chain to get down to the supervisors at the detachment
4 level -- and I want to ask you about the Region 2 level just
5 as it relates to the supervisory failures in this case. I
6 don't want to ask you about what responsibilities Region 2
7 had, anything like that, just -- or duties. I'm asking about
8 how this supervisory chain may not or may have failed.

9 First of all, are you familiar with Region 2 level, and
10 what -- can you tell us what that is?

11 A. Yes. There was a Field Investigative Region 2, which was
12 responsible for multiple installations, to include Holloman
13 Air Force Base --

14 Q. And who was --

15 A. -- at Detachment 225.

16 Q. I'm sorry. I didn't mean to interrupt.

17 Who was the Region 2 commander responsible -- the
18 supervisory commander at the time of the Devin Kelley
19 investigations?

20 A. I'm trying to remember if it was Colonel Hudson or --
21 there was also another deposition by another colonel who I
22 believe is his deputy, a female colonel. But they expressed
23 opinions about this, and so did others that I read. So I --

24 Q. Well, let me ask you about Colonel Hudson, who was -- you
25 got that correctly.

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1 Did you review Colonel Hudson's deposition?

2 A. I did.

3 Q. And in terms of what we're discussing about, about these
4 sort of 25-year failures in the Air Force to correct these the
5 issues that are -- had happened in the Devin Kelley
6 investigation, what did Colonel Hudson say about his awareness
7 to provide the IG information to supervisors at Detachment 225
8 and security -- Detachment 225?

9 A. Just that he wasn't aware of that requirement until after
10 the Devin Kelley shooting.

11 Q. Okay.

12 A. And that they can read, you know, as far as the
13 requirement to follow a checklist. Another agent said that.

14 So back to your threshold question before the objection,
15 there was a -- the Court can assess what the attitude was of
16 the supervisory agents to explain why this wasn't either taken
17 seriously or wasn't pushed down, but there was ignorance at
18 FIR 2 of the --

19 Q. Let me stop you. You said -- and anytime I hear
20 terminology that I want to be clear, I'll interrupt you. And
21 I don't mean to be rude.

22 A. Yes, sir.

23 Q. I just want to make sure -- you said there were ignorance
24 at FIR 2.

25 Are you referring, when you say "FIR," to Region 2

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1 command?

2 A. Yes, Field Investigative Region Number 2 of the OSI, yes,
3 sir.

4 Q. Okay. So you said you reviewed Colonel Hudson's
5 deposition, who was the AFOSI Region 2 commander.

6 You did review that particular deposition. You said that
7 he was unaware of these IG investigations until after
8 Devin Kelley committed the shooting?

9 A. As I recall.

10 Q. How would that affect the supervisory —

11 THE COURT: One second.

12 MS. CHRISTILLES: Your Honor, I thought that
13 Mr. Alsaffar was trying to get some background on supervision.
14 Your Honor has already ruled on the supervisory duties with
15 respect to the region, and the — I believe the only issue
16 before this Court is supervision at Det 225.

17 So I let Mr. Alsaffar go, as I thought we were
18 getting background, but I believe we're going into the issue
19 of supervision at the region level, which has already been
20 ruled on by this Court.

21 MR. ALSAFFAR: We are not, Your Honor. I am
22 explicitly not addressing whether or not they had a legal
23 failure or a duty failure.

24 The question is a factual one. How did this happen?
25 It's not only Detachment 225. They keep trying to limit it.

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1 It's -- now we've learned it's actually security forces as
2 well involved in this case, all at Holloman Air Force Base.

3 But the question is -- this isn't about legal duty of
4 supervisors for Region 2. This is about how -- how did
5 Holloman Air Force Base supervisors have no idea about these
6 rules and regulations that they had to have?

7 And it is relevant to understand that this happened
8 at more than just one level. So it wasn't just the local
9 level. Supervisors at local can't do their job if supervisors
10 above them don't even know if there's a problem that exists.

11 THE COURT: That's overruled. You can continue.

12 BY MR. ALSAFFAR:

13 Q. I won't belabor this point because I think you just
14 pointed out the major problem, Colonel, which was the Region 2
15 commander didn't even know this was a problem.

16 Is that a fair summary of Colonel Hudson?

17 A. Yes, sir.

18 Q. Okay.

19 A. Yes, sir.

20 Q. So let's go down to -- I'm going to move down into command
21 levels. We talked about IG telling the various command
22 levels, the Region 2 supervisors getting that information down
23 to the local. I'd like to talk about the local supervisory,
24 and this is in the AFOSI department first.

25 So I want to talk about OSI first, and then we'll talk

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1 about the security forces on Holloman Air Force Base.

2 Are you tracking that?

3 A. I'm tracking, yes, sir.

4 Q. Okay. Let's first talk about Detachment 225, the OSI
5 detachment.

6 First, what's the DODI instruction, the Department of
7 Defense instruction, that specifically relates to AFOSI
8 fingerprint submission and data?

9 A. Well, there's two. The DOD is 5505.11, and the OSI manual
10 is 71-121.

11 Q. I don't want to go through all of this. The Court has
12 been highly, highly educated about all these instructions. I
13 just want to kind of get to the heart of those sections in
14 terms of the supervisory level --

15 A. Sure.

16 Q. -- so that we can talk about that specific one.

17 But let's show JEX Number 8, which is the first one you
18 mentioned, DODI 5505.11, page -- let's just show page 1 so we
19 know it's the instruction.

20 Do you see that?

21 A. I do see it.

22 Q. Okay. And if we could just go ahead and skip to page 2.
23 And if we could highlight paragraph 4.

24 All right. Now, just very quickly, just to orient
25 ourselves a little bit, when we say "Department of Defense

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1 instruction," what does the Department of Defense include when
2 it's referring to law enforcement organizations?

3 Is it just OSI folks, or is it more than that?

4 A. Well, the distinction is DCIOs are defense criminal
5 investigation organizations. That would be OSI, NCIS. And
6 DOD law enforcement organizations are their police arm, the
7 security forces, the military police, and the shore patrol.

8 Q. And I don't mean to be basic, but does this mean that this
9 Department of Defense mandatory instruction also applies to
10 OSI and security forces?

11 A. Yes, it does.

12 Q. Okay. And is there anything in the Department of Defense
13 instruction that says that security forces can ignore their
14 mandatory obligations if they independently determine, "Nah,
15 this isn't my case. I only touched it for a little while.
16 It's not my case anymore"?

17 Anything like this in this mandatory instruction?

18 A. I would say not if they independently determined that.
19 There is, I believe, either in this instruction or a related
20 one, the ability for one organization to take investigative
21 lead.

22 But, again, there's no get-out-of-the-responsibility
23 exception for either OSI or security forces when the criteria
24 applies for them to submit fingerprints or final disposition
25 reporting information.

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1 Q. Let's go to page 6, just to make sure that for the rest of
2 the time we're talking about this, we're oriented. And I want
3 to highlight Article 128 for you, which is paragraph 33. It
4 says "assault."

5 A. Yes.

6 Q. This part of the DODI instruction -- and I believe we'll
7 show you the Air Force one too.

8 Can you tell us the significance of this qualifying
9 offense, what that means?

10 A. Well, Article 128 is of the Uniform Code of Military
11 Justice. That's Title 10 U.S. Code, Section 928.

12 There are a variety of offenses in the manual for
13 court-martial. There is also an accompanying table of maximum
14 punishment for the variety of offenses, roughly 18. Three of
15 them are punishable by less than a year. The other 15 or more
16 are punishable by a year or more.

17 So Article 128 is a qualifying offense that requires
18 submission of fingerprints if you have probable cause to
19 believe that someone has committed that offense. That's the
20 significance there.

21 Subsequent to that, if there is a final disposition that
22 requires a -- that is a conviction -- I'm sorry. I'll stop.

23 Q. No. No. Because I want to talk about -- let's go to
24 page 10, because you were talking about that specifically,
25 just so that we can see the requirement in writing for

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1 military subjects.

2 So if we go to page -- JEX 8, page 10 and paragraph 1 and
3 paragraph 3.

4 This is the instruction that applies to military subjects
5 like Devin Kelley; is that correct?

6 A. That's correct.

7 Q. All right. And if you look at -- we're going to highlight
8 both of them for you so you can see both of them at the same
9 time.

10 If you look at paragraph 1, again, that relates to both
11 OSI and security forces; correct?

12 A. That's correct.

13 Q. And what is the mandatory instruction for reporting -- for
14 reporting final disposition or conviction? Let's just say
15 it's conviction data for assault, like in this case.

16 What's the reporting requirements for both OSI and
17 security forces?

18 A. On the final disposition piece?

19 Q. Yes.

20 A. Okay. On the R-84 final disposition, they've got a 15-day
21 time line to submit the FDR report after that has been
22 communicated to the OSI or security forces.

23 Q. Okay. And when was Devin Kelley convicted of his
24 qualifying assault charges?

25 A. It was November -- I believe November 7th of 2012.

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1 Q. All right. So within 15 days after that or shortly after
2 that, upon receipt from both Air Force and security forces,
3 that data should have gone to the FBI; is that right?

4 A. Approximately the 22nd of November 2012.

5 Q. All right. And we know that did not happen; right?

6 A. That is correct. Though, I believe -- and I know the
7 parties have stipulated to this, so the Court can look at
8 that.

9 But there was a -- part of the requirement to be
10 completely clear is, once this information is communicated to
11 the parties, I believe -- or, excuse me, the law enforcement
12 entities. So security forces had that information on the
13 7th of November 2012. I believe the trigger for -- or the
14 criteria for OSI was when they received the general
15 court-martial-convening authority's action on the sentence.

16 So -- and that did not happen until, I believe, a month --
17 just over a month later, around the middle of December 2012.
18 And that, again, is -- both parties can look at the
19 stipulation there as to those details.

20 Q. Okay. Well, let's talk about the Air Force instruction
21 very quickly, and I want to focus on -- and what I'm talking
22 about -- when I say "Air Force instruction," is it okay if you
23 understand that I'm referring to 71-121?

24 A. Yes, sir. I can understand that.

25 Q. Okay. And I'd like to jump to that instruction that

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1 specifically relates to supervisory monthly reviews and then
2 supervisory reviews for what you've termed "investigative
3 sufficiency."

4 A. Yes, sir.

5 Q. You mentioned earlier in your testimony about your
6 extensive experience in 25 years working with the Air Force
7 and the IG in the Air Force and the criminal law enforcement
8 organizations that you had -- you regularly dealt with
9 investigative sufficiency.

10 Did I -- in case files. Did I hear that correctly?

11 A. Yes, sir.

12 Q. Okay. Would investigative sufficiency include -- and I'm
13 referring to the -- these instructions, the AFI instructions.

14 Would they include the review of fingerprint data and
15 criminal history data to ensure those were sufficiently
16 complied with?

17 A. Short answer is yes, it would, because the criteria for
18 submission of fingerprints, you know, is establishment of
19 probable cause. And there's a checklist to make sure you have
20 investigative sufficiency.

21 Included on that checklist is the fingerprint requirement.
22 And for case closure, the final disposition report submission.

23 So it's not just administrative. It's actually
24 substantive for having investigative sufficiency, that you had
25 probable cause, that you submitted the fingerprints. I mean,

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1 these are, you know, lightbulbs popping off in the brain of
2 the case agent and the supervisor saying, "Hey, have we done
3 everything?"

4 Q. And if we can --

5 THE COURT: One second.

6 MS. CHRISTILLES: Objection. Speculation.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. If we could look at page 51 of -- I'm sorry, JEX 4,
10 page 51. I believe this is Section 4.24.31. I hope I got
11 that sequence right. So this is page 30 -- I'm sorry --
12 page 51, please.

13 And this is the section I want to talk to you about that I
14 just mentioned about supervisory.

15 Do you remember the monthly review requirements?

16 While we're showing this to you, Colonel, can you just
17 tell me what your understanding is of this mandatory
18 instruction as it relates to supervisory monthly reviews at
19 Holloman Air Force Base during the Devin Kelley investigation
20 and what that -- what this required them to do?

21 A. Well, it's a -- to be pristine, you would check all
22 aspects of investigative sufficiency up to that point in the
23 case. And, you know, if I am certain I've complied with
24 something, I don't have to review it, necessarily, but I want
25 to look at -- I would want -- I'm trying to be careful about

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1 what I assess an ordinarily reasonably prudent OSI agent and
2 supervisor would do, not what I would do as a staff judge
3 advocate.

4 So as a staff judge advocate, we look at a case file. And
5 we're looking for problems, for gaps, seams, issues if I'm
6 prosecuting a case. Frankly, I do the same if I'm defending a
7 case. What did they miss? Setting that aside, that's the
8 context I bring to this.

9 Now, as a prudent OSI agent, as a supervisor, I really
10 want to make sure that all the elements of the offense are
11 met; that the -- I've got evidence to establish; I've followed
12 my investigative leads; that if I've established probable
13 cause, I've either done it on my own or I've got the SJA's
14 advice.

15 That should immediately trigger in my mind the
16 probable-cause piece. Get fingerprints. You know, two sets;
17 one for the file, one for NICS. And, you know, those are the
18 things you're doing.

19 THE COURT: Yeah. So let's stop here. One, he's not
20 being responsive to your question. I think he went off
21 completely differently.

22 THE WITNESS: Sorry.

23 THE COURT: And, two, we really need to go to Q and A
24 and avoid the long narratives.

25 MR. ALSAFFAR: That's my fault. I will correct that,

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1 Your Honor. I apologize.

2 BY MR. ALSAFFAR:

3 Q. Colonel, that's my fault. And I'll try to break these up
4 a little bit more to make it a little quicker. And I know
5 you've never served as an expert before, and so that's my
6 responsibility. So I apologize.

7 I'm showing you 4.24.1.3.

8 Is that the mandatory Air Force instruction that was in
9 place during Devin Kelley's investigation that required
10 monthly reviews by the supervisors at Detachment 225?

11 A. Yes, sir.

12 Q. Okay. Have you had a chance to review the deposition
13 testimony of the supervisory agents, Bustillo and -- as well
14 as the case agent, Mills, that worked on this case, the
15 Devin Kelley case?

16 A. Yes, sir. Mills and, I believe, Holz too.

17 Q. Right. And just to make it quick, did both Bustillo and,
18 let's say, Mills as well, who worked on Devin Kelley's case,
19 agree that this instruction required them to have monthly
20 reviews and that as part of those monthly supervisory reviews,
21 they were supposed to go over the fingerprint submission
22 and -- I'm sorry.

23 The investigative sufficiency requirement would include
24 fingerprint and final disposition information?

25 A. Yes. It would include fingerprints and then, once ready,

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1 final disposition report.

2 Q. Okay. I want to show you page 80 of Joint Exhibit 4.

3 Actually, let's skip that. We've already talked about
4 this.

5 Let's go to page 33, which is the -- relates to the close
6 file checklist that you just mentioned.

7 Do you remember mentioning that?

8 A. Yes, sir.

9 Q. Okay. And I want to show you Section 3.16.4.

10 Now, does this specifically address leadership
11 responsibility, supervisory responsibility?

12 A. Yes. Right at the beginning.

13 Q. Okay. And what does unit leadership mean?

14 A. I take that as the superintendent or DetCo.

15 Q. And you had mentioned that you had worked with
16 superintendents in DetCos as part of your career in the
17 Air Force. You know, "superintendent" may mean something to
18 somebody else.

19 But in the Air Force parlance, in Detachment 225, was
20 superintendent a supervisory position reviewing criminal
21 investigations?

22 A. Yes.

23 Q. Okay. And "det commander," does that stand for detachment
24 commander?

25 A. Yes, it does.

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1 Q. All right. And I want to show you, on this mandatory
2 instruction page -- Joint Exhibit 4, page 1, actually. And if
3 we just go to the first page of Joint Exhibit Number 4.

4 And if you look down towards the middle, does this
5 instruction also define for us "unit leadership" and what that
6 means? If we go down to the -- yeah, the bottom half there.

7 Do you see the term "unit leadership"?

8 A. It does.

9 Q. And you mentioned that -- you had mentioned commander
10 already.

11 What is the SAC?

12 A. Typically, the SAC is the detachment commander, but it can
13 also be the superintendent on certain units.

14 Q. Well, let's look at that close file checklist that the
15 instruction said that unit leadership must use in these
16 reviews and -- of their case files.

17 Let's go to -- we're still in Joint Exhibit Number 4, and
18 let's go to page 159 through -60. Thank you.

19 Is this the close file checklist that you were referring
20 to?

21 A. Yes, sir.

22 Q. Okay. And can you tell the Court what -- what are the
23 supervisor's responsibility, just specifically relating to
24 this checklist, relating to fingerprint submission and final
25 disposition or criminal history data?

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1 A. Going back to look through the tab where it required it.

2 But to answer your question, I believe at page 160,
3 blocks 17 and 18 require them to indicate whether that has
4 been submitted or not or is not applicable.

5 Q. Can I ask you -- and if we could show 17 and 18.

6 So these specific issues that we're talking about in
7 Devin Kelley's case, the fingerprints and the FDR, is it --
8 why is that the Air Force -- these instructions are very long.
9 They always are. Just -- you know, we're used to that.
10 They're long instructions.

11 Why is it, at the end of the day, for their supervisors,
12 does the Air Force give them a two-page checklist? What's the
13 purpose of that?

14 A. I mean culturally, the Air Force has had a mentality of
15 what gets put on a checklist gets checked, gets inspected, and
16 gets complied with. So the purpose of putting it on the
17 checklist is to comply it.

18 And I don't mean to be flippant, but -- I don't want to
19 say "dumb it down," but that's what immediately comes to mind.
20 Keep it simple. And these are the key things that you must do
21 to have investigative sufficiency, get all of this done.

22 So before you close it, make sure you physically put eyes
23 on each of these requirements and answer one of the three
24 blocks.

25 Q. Is one of the purposes, as you said, keep-it-simple

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1 checklist relating to these issues that we're talking about
2 here -- is one of the purposes to ensure that somebody doesn't
3 come in the detachments at Holloman and say, "You know what?
4 These instructions are so complicated. I can't possibly
5 follow this stuff. It's hard to follow. I don't know what to
6 do."

7 Is that one of the purposes of these checklists?

8 MS. CHRISTILLES: Objection. Leading.

9 THE COURT: Sustained.

10 BY MR. ALSAFFAR:

11 Q. What is one of the purposes of these checklists?

12 A. So you have a fairly lengthy regulation, and this is a
13 control measure. It's a check, if you will, on compliance.

14 It's a tool to be used by the case agent and supervisors.
15 The case agent, to make sure it's sufficient; the supervisor
16 to, again, make sure it's sufficient in a supervisory capacity
17 at that local level. And then they have a -- when they close
18 it and archive it, they have a separate checklist too.

19 Q. So weren't there two checklists in this case for Holloman
20 Air Force Base to simply follow these rules?

21 A. Yes. There is the file closure, and then there is the --
22 well, there's the investigative sufficiency checklist, and
23 then there's a supervisory checklist to use as well.

24 Q. Let's look at that one. So just to be clear for the
25 Court, this one that we just showed you relates to -- at the

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1 end of the case file, when it's ready to be closed, a
2 supervisor is supposed to come in and use this one?

3 A. That's my understanding, yes, sir.

4 Q. Okay. And then you mentioned that there's another one, an
5 investigative -- supervisory investigative sufficiency
6 checklist.

7 I would like to show that to the Court and to you as well,
8 which is page 174 of JEX -- I'm sorry, it's not page 174. I
9 apologize. It's page 307.

10 You're already ahead of me. Thank you, Shawn (phonetic).

11 And this is the first page.

12 Is this the supervisory investigative sufficiency list
13 that you were talking about?

14 A. Short answer, yes.

15 Q. Okay. And if we could go to the -- 309 through 310, I
16 believe is the -- that relates to the fingerprint submission
17 and the R-84 or -- when we say "R-84," what does that mean?

18 A. That's the final disposition report.

19 Q. All right. So when we talk about criminal history data,
20 when we talk about final disposition reports, when we hear the
21 word "R-84" -- which we heard a lot this morning -- we are
22 talking about the information related to the criminal
23 conviction or the acquittal; correct?

24 A. Right. That's correct.

25 Q. All right. So what does this supervisory investigative

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1 sufficiency checklist in mandatory instruction 71-121 say
2 about those two issues, fingerprints and final disposition
3 reports?

4 A. Well, if you go to page 309 at block 22, along with the
5 ones you've already highlighted at 53 and 54, it wants to make
6 sure that you have -- yes, you've done this; no, you haven't;
7 or it's not applicable. And when it's not applicable, I
8 understand they often enter a note in an internal data page,
9 or IDP, explaining why it was not.

10 Q. All right. And we're about to talk about what you just
11 mentioned, the internal data page or reviewer notes.

12 Does that sound familiar? Did you look at those in this
13 case?

14 A. I did.

15 Q. And I want to stick here with this investigative
16 sufficiency checklist.

17 You remember we talked about the instruction that said
18 you're supposed to -- these supervisors are supposed to have
19 monthly meetings to go over the investigative sufficiency.

20 Do you recall that?

21 A. Yes, sir.

22 Q. And approximately how many months are we talking about
23 that the Devin Kelley file -- the life of the Devin Kelley
24 file was?

25 A. 15 to 17 months. I'd have to go back and do the math

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1 here. I know there were at least 15 --

2 Q. You're right. You're right.

3 A. Let me rephrase that. Yes, 15 to 17 months.

4 Q. Okay. And so at each of these monthly meetings, was the
5 supervisory agent at Detachment 225 supposed to have this
6 checklist with them and look at the three to four different
7 parts of the checklist that actually reference the fingerprint
8 and criminal history data?

9 A. Yeah. I assess a reasonably prudent agent, as a
10 supervisor, would do that.

11 Q. And this may be an obvious statement, but was that ever
12 done in all these monthly reviews as it related to the
13 Devin Kelley case at Holloman Air Force Base, even with a
14 checklist?

15 A. The short answer, no, it was not. I'm trying to remember
16 which report indicated that it might have been pencil-whipped
17 to close it. But, no, it was not.

18 Q. And when you say it "might have been pencil-whipped,"
19 you're talking about the checklist "might have been
20 pencil-whipped," what does that mean, "pencil-whipped"?

21 A. To me, that means they marked it without actually putting
22 eyes on the final disposition report or eyes on the
23 fingerprint and the submission to NICS of those required
24 documents.

25 Q. All right.

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1 A. So before you would mark it onto the checklist, you would
2 and the want to confirm that it was done, not make an
3 assumption.

4 Q. All right. And does that mean that just because you check
5 it off, you actually have to do it?

6 A. Yes.

7 Q. Okay. I'd like to talk about what the case agents the
8 opportunities -- the supervisory opportunities that the SAICs,
9 the superintendents, the commanders had at Holloman Air Force
10 Base to actually check the Devin Kelley file and ensure that
11 the information in there was properly submitted.

12 Is it okay if we transition to that?

13 A. It is.

14 I'm older in years, and it would be -- if appropriate, is
15 it okay if we ask for just a very short comfort break?

16 MR. ALSAFFAR: Your Honor, it has been a hour and
17 15 minutes. Is that okay?

18 THE COURT: Yes. Let's take 15.

19 MR. ALSAFFAR: Thank you, your Honor.

20 (Recess.)

21 THE COURT: So before we resume with questions, let's
22 just do cleanup here.

23 So when I admitted exhibits on our first day of
24 trial, I was assuming Joint Exhibit 1 through 803 were just
25 chronologically in order, but apparently they're not.

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1 And so I believe the correct ruling is Joint
2 Exhibit 1 to Joint Exhibit 86 are admitted. There is no Joint
3 Exhibit 87 through 109. Joint Exhibit 110 to Joint
4 Exhibit 749 are admitted. There is no Joint Exhibit 750
5 through 798. With regard to Joint Exhibit 799, I did not
6 indicate that as admitted.

7 What are your notes?

8 MR. ALSAFFAR: My notes have --

9 THE COURT: Oh, that would have been part of the
10 global, right. Yeah. So 799, then, is admitted. There is no
11 800. And then 801 through 803 are admitted.

12 So with that cleanup, let's continue.

13 MR. ALSAFFAR: Would you like me to proceed, Your
14 Honor?

15 THE COURT: Yes.

16 MR. ALSAFFAR: Thank you, your Honor.

17 BY MR. ALSAFFAR:

18 Q. Colonel Youngner, can you hear me okay?

19 A. Yes, sir, I can.

20 Q. Can you see me okay?

21 A. Yes, sir, I can.

22 Q. All right. And I just want to remind you again that if
23 you see me put the stop-sign hand on, I apologize. I'm not
24 trying to be rude to you, Colonel, but I'm just trying to find
25 a better way to communicate on this connection. Okay?

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1 A. Yes, sir. And I also understand that I'm still under
2 oath.

3 Q. Thank you. Okay. Colonel, can you please -- we were
4 transitioning to talk specifically about the supervisory
5 reviews and the number of reviews that were done on
6 Devin Kelley's case file.

7 Do you recall Special Agent in Charge Vince Bustillo's
8 testimony on that matter?

9 A. I do.

10 Q. Okay. And in addition to that, after reviewing the
11 requirements of the instruction that we just went over in
12 detail, along with the depositions of the various supervisory
13 case agents in this case, I'd like to break these numbers down
14 a little bit.

15 You've already told us 15 monthly reviews are required.
16 And did the case agents at Detachment 225 also agree with
17 that?

18 A. Yes, they did.

19 Q. All right. And were there also weekly reviews by the
20 supervisors on the case files?

21 A. Yes, sir, there were.

22 Q. As part of those weekly reviews, would they have also been
23 required?

24 And I'm talking about the supervisory agents in charge,
25 the superintendents, the supervisory folks at Detachment 225.

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1 Were they also required during those weekly case meetings
2 to review investigative sufficiency items in Devin Kelley's
3 file?

4 A. Yes. That's the whole purpose of the weekly review is
5 investigative sufficiency and progress.

6 Q. So if we add the 15 that they said they had every month on
7 Devin Kelley's file and we add the weekly supervisory case
8 meetings reviewing his file for fingerprints and criminal
9 history data information, how many does that add up to?

10 A. 75.

11 Q. All right. And I want to make sure I heard you correctly.
12 Did you say 75?

13 A. Yes, I did, 75.

14 Q. All right. Now, by the way, the head SJA -- or one of the
15 SJAs at the time of the Devin Kelley investigation, what was
16 his name again?

17 A. It was Lieutenant Colonel Tullos and then later Owen.

18 Q. Did he also agree with that assessment that 75 supervisory
19 reviews were done -- or should have been done on the
20 Devin Kelley case file?

21 A. As I recall, yes.

22 Q. Okay. I want to now show you the -- another element
23 that -- of supervisory review that relates to these
24 investigative sufficiency requirements, and I want to turn
25 your attention to the instruction again, 71-121?

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1 A. Yes.

2 Q. Again, that's Joint Exhibit Number 4, and I want to draw
3 your attention to page 51 of Joint Exhibit 4. So it's 4-51.

4 And tell me when you can see it on your screen.

5 A. All I see is --

6 Q. Don't worry. I'll maximize it. I just want to make sure
7 that it's -- I always check when I do these remote depositions
8 or testimony because I want to make sure that you're seeing
9 something. I can make it better. I just want to make sure
10 you're seeing it.

11 A. Got it.

12 Q. Okay. And I want to draw your attention to
13 Section 4.24.1.3 again, the first paragraph. If we could --
14 and I'll try to highlight it for you to make it easier.

15 If we can just look at the first sentence -- highlight the
16 first sentence, from case file to retention.

17 A. Yes.

18 Q. I'm sorry. The second sentence as well. That's my fault.

19 So we've already talked about the case file needing a
20 monthly review, but what I want to ask you about is the second
21 sentence of this mandatory instruction.

22 "This review will occur from the date the allegation or
23 complaint was received" --

24 So what date would that be in Devin Kelley's file,
25 approximately?

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1 A. The 9th of June 2011, I believe, was when they first
2 interviewed Devin Kelley and Tessa Kelley.

3 Q. And then it says "until closed and the AFOSI Form 2 is
4 forwarded to headquarters for retention."

5 What does that mean?

6 A. They have a closure form and the case summary, I believe.
7 I'd have to go back and look up the index of the OSI forms.

8 But the bottom line is this is submitted, and that's
9 reflected in their Investigative Information Management
10 System, or I2MS, as well.

11 Q. All right. And I want to look at that specifically. But
12 when this mandatory instruction says that you're supposed to
13 look at it not only monthly until -- from the time you open it
14 to close it, but also until it is forwarded to headquarters
15 for retention, is that what's referred to as archiving the
16 file?

17 A. Yes. That's archiving the file. And you would not
18 archive it until you completed that closure checklist as well.

19 Q. And that closure checklist you're talking about is the
20 attachment -- the close file checklist that we saw earlier;
21 correct?

22 A. Yes, sir.

23 Q. All right. So you would do that checklist not only at
24 closing but at archive retention state as well.

25 Is that what you're saying?

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1 A. Yes. You would include that, make sure it's there for the
2 archive record.

3 Q. Okay. So if I can show you that date in this case -- and
4 we have an audit trail record. That's Joint Exhibit 19.

5 Okay. And it's page 1. And what I'd actually like to do is
6 focus on these two -- on two dates.

7 Let me start with the "submit for closure."

8 What date is that?

9 A. That is the 14th of December 2012.

10 Q. And I apologize --

11 A. And that --

12 Q. I apologize I didn't get this on the record, but are we
13 looking at the Devin Kelley case file right now in terms of
14 this document?

15 A. Yes.

16 Q. All right. So remember the mandatory instruction said,
17 you know, you've got to do these monthly reviews from the time
18 you open the case file until you close it.

19 Is that this time? The closure is 12/14/2012?

20 A. That is correct.

21 Q. All right. I want you to turn your attention to the
22 bottom of this paragraph.

23 You see that bottom date -- and we can highlight it,
24 Shawn. I apologize I didn't highlight it.

25 It says, "Send to archive."

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1 Do you see that?

2 A. I do see that.

3 Q. Do you remember in the instruction -- the mandatory
4 instruction we just showed you, there was -- it said, you
5 know, do these monthly reviews all the way through archiving.

6 Do you remember that?

7 A. Right until that point, and the Form 2 gets forwarded.

8 Q. All right. So what's the archival date of this file in
9 this case?

10 A. It is the 10th of April 2013.

11 Q. Was Lyle Bankhead a supervisory agent at Holloman Air
12 Force Base?

13 A. Yes, he was.

14 Q. All right. Did the supervisory agent at Holloman Air
15 Force Base pencil-whip this investigative closure checklist
16 that you talked about at this moment in time, 4/10/2013?

17 MS. CHRISTILLES: Objection. Speculation.

18 MR. ALSAFFAR: I don't think so, Your Honor.

19 THE COURT: Well, I'm not sure he can say it was
20 "pencil-whipped." He can say a different word, but...

21 MR. ALSAFFAR: I'll do that.

22 BY MR. ALSAFFAR:

23 Q. Colonel, did Lyle Bankhead actually -- at the archival
24 stage, did he actually send the fingerprints of Devin Kelley
25 and conviction history to the FBI?

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1 A. As I reviewed the record and the case file for OSI and the
2 depositions, he did not, because the NICS did not receive it
3 and there -- they did not receive the fingerprints or the
4 final disposition report, which, if he had actually checked
5 the file and checked I2MS and confirmed that they had been
6 submitted before he checked off on the closure list, he would
7 have seen that they had not, and he would have to make sure
8 that was accomplished at that time. So no.

9 Q. And I want to show the Court the actual list and why I
10 mentioned that term that you used earlier.

11 I want to show Joint Exhibit 22. This is the close
12 investigation file checklist for Devin Kelley. This is Joint
13 Exhibit Number 22, if we could look at page 4.

14 And if you look at the very last item, 32, it is checked
15 that the close investigation file checklist was followed; is
16 that right?

17 A. Yes, it is.

18 Q. All right. And even though it was checked, it was not
19 done. It was just checked.

20 Is that fair to say?

21 A. Yes.

22 Q. And if you look at paragraph 17 and 18 of this close
23 investigation checklist for Devin Kelley, what does that say?

24 A. Nothing. It doesn't indicate compliance or noncompliance.
25 It's blank.

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1 Q. And despite not checking that they had actually done the
2 fingerprint and conviction report for Devin Kelley, they
3 checked at Detachment 225 that they completed the whole
4 checklist.

5 Is that what we're reading?

6 A. That's correct.

7 Q. Okay. Now, I hate to state the obvious, but does that
8 comply with the mandatory instructions for supervisors at
9 Detachment 225?

10 A. No, sir, it does not.

11 Q. All right. Now, let me go back, if we don't mind -- I
12 don't mean to whiplash you too much, Colonel, but if we can go
13 back to Joint Exhibit Number 4, page 51, that we had that
14 talked about -- I'm sorry, not Joint Exhibit 4, Joint
15 Exhibit 19 that showed the archival date.

16 Can you see that okay, Colonel?

17 A. I can. It was the April 10, 2013, date.

18 Q. All right. Now, you remember a few minutes ago, based on
19 the testimony of the actual case agents on the Devin Kelley
20 case, that we added up 75 monthly and weekly reviews in the
21 Devin Kelley case file should have included looking over this
22 mandatory requirement.

23 Do you remember that discussion?

24 A. Yes, sir.

25 Q. Now, there's more that they should have done; isn't that

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1 right?

2 From the time of closure to the time of archive, there was
3 more time and opportunity for them to do their supervisory
4 monthly reviews. Is that fair to say?

5 A. As I understand --

6 Q. Let me rephrase the question.

7 A. To answer your question --

8 Q. Sorry. Did you understand my question?

9 A. I'd rather you rephrase it to make sure I'm clear.

10 Q. Okay. The mandatory instruction, 71-121, required that
11 monthly reviews by supervisory -- you know, investigative case
12 sufficiency reviews be conducted from -- not just stopped at
13 closure but all the way of archival of the case file; is that
14 right?

15 A. That's right, yes, sir.

16 Q. Okay. So how many more months or more monthly reviews,
17 between the date of closure of Devin Kelley's file and the
18 date of archival, should the Holloman Air Force Base
19 supervisory agents have conducted?

20 A. Approximately four more monthly reviews --

21 Q. All right.

22 A. -- if you look at, you know, December to April.

23 Q. Okay. So that would take the number to about 79 monthly
24 and weekly supervisory investigative case sufficiency reviews
25 that should have been done on Devin Kelley's file?

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1 A. Yes, sir.

2 Q. Okay. Now, I want to talk about something a little bit
3 different, not just monthly reviews that should have been done
4 and the number.

5 But I want to actually talk about how many times that the
6 Devin Kelley case file was contacted or looked at by various
7 agents, including supervisory agents, at Holloman Air Force
8 Base and Detachment 225.

9 Does that make sense, what I'm asking you?

10 A. Yes, sir, it does.

11 Q. Okay. And were you able to review documents that were
12 produced by government in this case that allowed us to
13 actually analyze or allowed you to analyze and review how many
14 times the supervisory agents and case agents were accessing
15 and looking at and -- Devin Kelley's case file for
16 investigative case sufficiency?

17 A. Yes, sir, I was. There were two files. One very large;
18 the other, a little bit smaller.

19 Q. Okay. I'd like to talk about that. Let's talk about that
20 first one. I believe it's Joint Exhibit 348.

21 I'm not going to blow this up because there's a lot of
22 information. This is an Excel native file that's had to be
23 converted. So it's got a lot of information on it, and it's
24 not easy to see.

25 But can you just tell us what this document is?

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1 A. It's referred to as an internal data page summary. The
2 acronym is IDP, india-delta-papa. And it contains internal
3 data that agents would note on a case file.

4 And so when the agents -- if you look at it from left to
5 right, it shows the date of a contact. And it shows, you
6 know, the substance of that, the person on the -- who touched
7 it on the right, and then whether they opened or locked the
8 case file when they were done.

9 Q. Okay. And we just -- if we could go back to that
10 highlighted example that you just blew up.

11 Thank you, Shawn.

12 Just to orient the Court, this is a good -- this is an
13 example of -- those agents that you see on the right, Hoy,
14 Harper, Meusburger, those are all supervisory case agents
15 touching this file; right?

16 A. Those are -- there is one subordinate agent who touched it
17 in addition to them, yes, sir.

18 Q. Okay. And this is Devin Kelley's file; correct?

19 A. Yes, it is.

20 Q. All right. So were you able to look at this file and just
21 simply conduct an account of how many times this IDP reviewer
22 note file showed supervisory agents as well as case agents
23 contacting -- having contact and review for investigative
24 sufficiency of Devin Kelley's file?

25 A. Yes, I did.

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1 Q. All right. I'm going to ask you -- can you tell me --
2 tell the Court how many times, based on JEX 348,
3 Detachment 225 supervisory agents, as well as the case agents
4 under, them contacted Devin Kelley's file?

5 A. I counted 53 contacts during that time period.

6 Q. Okay. I want to now show you another document. We were
7 able to -- were you able to look at an audit trail document
8 that was produced by the government that showed every single
9 time, in addition to the IDP and reviewer notes we see here,
10 but also every single time a Detachment 225 supervisory agent
11 or case agent contacted Devin Kelley's file?

12 A. Yes, sir. I believe that was the 37-or-so-page document.

13 Q. All right. Well, let's put up that document. That's
14 JEX 349.

15 And, first, can you just confirm that this is -- yeah,
16 let's highlight a few lines just so we can see what this is.

17 A. That appears to be the Devin Kelley summary that I
18 reviewed. It is the Devin Kelley summary that I reviewed.

19 And from -- just to orient the Court, from left to right,
20 it's got the agents' name abbreviation, a type of contact
21 done. And then to the right, a date/time stamp of when they
22 posted an entry.

23 This would, I understand, be in, again, I2MS, the OSI's
24 Investigative Information Management System.

25 Q. All right. What I'd like you to do is -- if you could,

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1 for me, I'd like to go through each year.

2 Summarize for the Court how many opportunities -- missed
3 opportunities the Air Force had in Devin Kelley's file to fix
4 any data corrections or problems with investigative
5 sufficiency, starting with the 2011 time frame, obviously,
6 when the case was opened.

7 So what I'd like to do is -- if you could -- if you could,
8 count for us and -- can --

9 MS. CHRISTILLES: Your Honor.

10 MR. ALSAFFAR: Can you hear me okay?

11 THE WITNESS: I can hear you okay, but I think you
12 have an objection, if I may be quiet until that's --

13 MR. ALSAFFAR: Sure. Sure.

14 MS. CHRISTILLES: Your Honor, I apologize. It took
15 me a minute to rereview Colonel Youngner's expert report, and
16 I did not find anywhere in his expert report where he analyzes
17 what he is now referring to as missed opportunities where case
18 agents touched the file.

19 And, therefore, I will object as this is outside of
20 Colonel Youngner's expert report and supplemental report.

21 MR. ALSAFFAR: Your Honor, that's not correct.

22 His -- both his initial report and supplemental report, which
23 you have, extensively talk about the various supervisory
24 misses, the various opportunities, the dates, et cetera.

25 This is actually just counting, simple math. That's

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1 all this is. He spent pages and pages talking about
2 supervisory negligence. I think they're just really objecting
3 to our simple addition.

4 THE COURT: But the addition is getting redundant
5 now.

6 So you've already talked about 79 missed monthly
7 contacts. Joint exhibit 348 already has 53. And then I'm not
8 sure what you're going to say now that 349 has.

9 But at some point, in all your math, you're going to
10 have to discount because, in some of those monthly contacts --
11 in 348, you're saying there was 53 missed contacts, but I'm
12 not going to go through a whole math exercise to see, well,
13 did that fall within the period of June 9, 2011, to
14 December 14, 2012? And so did that monthly contact constitute
15 a contact on this graph?

16 I get your point, and let's move on.

17 MR. ALSAFFAR: Okay. We can do that, Your Honor. No
18 problem.

19 Your Honor, is it okay if I just get on the record
20 the total? One question on the total?

21 THE COURT: Just ask him one question on what he
22 thinks the total is for 349.

23 MR. ALSAFFAR: Thank you, your Honor.

24 BY MR. ALSAFFAR:

25 Q. And, Colonel, what we're going to do is -- if I can just

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1 ask you one simple question, based on your review of both
2 these documents and your review of the record case file -- not
3 double-counting either, not counting the stuff that was also
4 included on 348 -- how many opportunities and contacts did the
5 detachment -- just the Detachment 225 supervisory case agents
6 have with Devin Kelley's file?

7 A. I counted 103, and that was just by the day. Just to be
8 very brief on the methodology, I didn't double-, triple-, or
9 quadruple-count contacts. So if Boyd touched it one day and
10 did ten things, I only counted that as one touch or one
11 contact.

12 But the answer, again, is 130 total. And that divided
13 into approximately, I believe, 96 touches or contacts by
14 supervisors and 34, if I -- I'd have to go back and check my
15 math -- subordinate agent contacts.

16 Q. So a vast majority of those contacts with Devin Kelley's
17 file over its lifetime were actually supervisory agents at
18 Detachment 225?

19 A. Over the entire lifetime of both documents, it was just
20 under 70 percent. And for that 349 JEX, it was 75 percent.

21 Q. Okay.

22 MS. CHRISTILLES: And, Your Honor, I'd just renew our
23 objection. Again, I looked through that report. None of that
24 analysis is in the report.

25 THE COURT: Yeah.

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1 MS. CHRISTILLES: He talks about missed
2 opportunities, but this is not discussed in his report.

3 THE COURT: All I'm going to take out of this is
4 there was numerous contacts and numerous opportunities for the
5 Air Force, through its supervisory agents, to see that
6 mistakes -- that some things weren't done and weren't
7 corrected.

8 MR. ALSAFFAR: Thank you, your Honor.

9 THE COURT: Got it.

10 BY MR. ALSAFFAR:

11 Q. Now, you remember earlier when we talked about the
12 inspector general reports that were just sort of related to
13 the entire Air Force issues with these submission of
14 fingerprints and criminal history data that covered the entire
15 Air Force.

16 Do you remember those reports?

17 A. Yes, I do.

18 Q. Did the Air Force inspector general also specifically look
19 at Detachment 225 -- at Holloman Air Force Base's compliance
20 rate with fingerprint submission and criminal history data?

21 A. Yes, after the Devin Kelley shooting.

22 Q. I want to show you JEX 432.

23 And, Colonel, this is one of the documents you reviewed.
24 This is the -- specifically the Air Force's inspector general,
25 not the DOD, but the Air Force inspector general.

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1 Do you see that?

2 A. Yes, I do.

3 Q. And I'd like to show you page 18. And if we could --
4 sorry. If we could highlight -- I believe it's in the first
5 paragraph. Actually, the next one, where it starts with
6 "After the shooting tragedy." Thank you.

7 What was the Detachment 225 failure rate? So specifically
8 Detachment 225's failure rate for reporting qualified
9 fingerprint data and qualified criminal history data?

10 A. It reflects a 43 percent noncompliance.

11 Q. Was Holloman Air Force Base's 43 percent failure rate
12 higher than the overall national average failure rate for
13 these items?

14 A. Yes. That summary is in that same paragraph, and it
15 reflected the whole rate being below the Air Force average in
16 the last sentence.

17 Q. I want to switch gears now to the security forces issue.
18 And I won't take too much time on this one, but we need to
19 talk about the security forces department or the security
20 forces element of Holloman Air Force Base.

21 So we had OSI, we also had security forces that were
22 involved in the Devin Kelley case; is that correct?

23 A. Yes, sir.

24 Q. And I want to show you JEX 11, which is the mandatory
25 instruction for the security forces, specifically.

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1 Did you have an opportunity to review this in forming your
2 opinions in this case?

3 A. Yes, I did have an opportunity to review that instruction.

4 Q. All right. And I won't belabor the point, but let me ask
5 you to get right to the heart of the matter.

6 Remember how we showed you the overall Department of
7 Defense instruction. We talked about 5505.11 had the
8 mandatory reporting requirements for both OSI and security
9 forces.

10 Do you remember that?

11 A. Yes, sir.

12 Q. Bottom line, did the Air Force create a security forces
13 instruction that contradicted the superior DODI instruction on
14 fingerprint and criminal history data reporting?

15 A. They did, and that was later corrected.

16 Q. And that contradiction actually existed in the security
17 forces at the time that Devin Kelley's case was being handled
18 by the security forces; is that correct?

19 A. Yes.

20 Q. All right. And what did Colonel Ford, who was the
21 handpicked corporate representative to represent the Air Force
22 in the litigation, the security forces representative, what
23 did he have to say about this conflict and whose
24 responsibility it was to resolve it?

25 A. He indicated that -- where he worked on the air staff. I

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1 believe it was Lieutenant General Reno who was responsible
2 ultimately for approving the regulation and that, once that
3 had been caught, it was correct.

4 Q. And that wasn't corrected in time for the Devin Kelley
5 security forces investigation, was it?

6 A. No, it was not.

7 Q. And I believe you said it was Lieutenant General Reno in
8 the Air Force who was responsible for this failure to follow
9 the mandatory instruction?

10 A. Yes, the deputy chief of staff. A4/7 is the designation.
11 But, ultimately, that general officer was responsible for
12 security forces within the entire Air Force as far as policy
13 and regulations.

14 Q. All right. And just so it's clear, Lieutenant General
15 Reno, who was responsible for creating this conflict in the
16 mandatory instructions for the security forces, I mean, she's
17 not a person that's actually responsible for reporting any
18 data to NICS; right? She's not a person who does that?

19 A. Short answer, no, she's not. She's responsible for
20 setting the rule set that the subordinates who are responsible
21 must follow.

22 Q. Now to be clear, at some point in time, the --
23 Devin Kelley was in jail at the Air Force? He was in
24 confinement; right?

25 A. Right.

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1 Q. And which department was responsible for the confinement
2 facility at Holloman Air Force Base? Was it OSI, or was it
3 security?

4 A. At Holloman Air Force Base, it was the security force --
5 it was the 49th Security Forces Squadron's correctional
6 division. And the AFI that governed their rule set was AFI --
7 Air Force Instruction 31-205, which I also reviewed.

8 Q. And you remember the Air Force inspector general report we
9 just showed you that related to this case specifically.

10 What did they have to say about the security forces'
11 obligation to mandatorily report at Holloman Air Force Base
12 security forces the conviction and fingerprint information on
13 Devin Kelley?

14 A. The DODIG concluded that the Security Forces Squadron did
15 have an obligation under the instructions to submit the final
16 disposition report data, and that obligation was independent
17 of the OSI obligation.

18 In fact, the security forces' obligation predated by about
19 a month the OSI obligation to submit the FDR, the final
20 disposition report.

21 Q. All right. So when we're looking at -- you know, we
22 talked about the OSI file having almost, like, 79 monthly
23 review requirements and weekly review requirements, the
24 hundred-plus contacts of Devin Kelley's file by the OSI.

25 There was also a security forces independent obligation to

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1 add on to that, is that fair to say, at Holloman Air Force
2 Base?

3 A. Yes, sir.

4 Q. So that number goes up, doesn't it?

5 A. As far as the -- there were four obligations found that
6 OSI had. There were two obligations security forces had. So
7 the number goes up to six, as far as the -- I mean, I don't --
8 as far as those obligations. And then as far as the total
9 contacts, yes, there was a separate list of contacts and time
10 elapsed for security forces.

11 Q. And who was the -- is there -- this -- this may seem
12 obvious again, and I apologize.

13 But is there a supervisory officer at the confinement
14 facility who was responsible for submitting this information
15 on Devin Kelley?

16 A. Ultimately, it is the squadron commander -- I believe
17 Lieutenant Colonel Boyd's responsibility. But at most
18 Air Force installations, there is a noncommissioned officer in
19 charge of the confinement facility.

20 It's typically a technical sergeant, sometimes a staff
21 sergeant, an enlisted noncommissioned officer who is trained
22 on confinement duties and responsibilities. And that is the
23 person who would typically -- unless they have some local rule
24 that's different. Under the AFI 31-205, that confinement
25 facility NCO would complete that paperwork, submission of the

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1 FDR to NICS.

2 Q. So I want to break this down a little bit.

3 On the security forces side of detachment -- I'm sorry,
4 Holloman Air Force Base security forces offices, Lieutenant
5 Commander Boyd was the security forces commander ultimately
6 responsible for submitting and ensuring that Devin Kelley --

7 A. And --

8 Q. Let me finish.

9 A. Please?

10 Q. -- for submitting and ensuring that Devin Kelley's
11 information was sent to the FBI?

12 A. Lieutenant Colonel Boyd would be the commander responsible
13 of the 49th Security Forces Squadron, the person responsible
14 for supervising that submission.

15 Q. And then you also mentioned that there was a
16 noncommissioned officer at the security forces confinement
17 facility as well that was a -- is that -- is the document --
18 if the judge says "NCOIC" at the confinement facility, is that
19 the noncommissioned officer you're referring to?

20 A. Yes, the noncommissioned officer in charge. And I put
21 that acronym, I believe, in any acronym list.

22 Q. Okay. In your report?

23 A. Yes, sir.

24 Q. Okay. And so that's -- the NCOIC at the security forces
25 confinement facility is another supervisory agent within the

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1 security forces side that had a -- that had a responsibility
2 but did not ultimately submit Devin Kelley's conviction or
3 fingerprint information to the FBI?

4 A. I would assess they are a supervisory law enforcement
5 official in charge of corrections. They were not agents.

6 Q. Thank you.

7 A. A minor point. Not to quibble. But different role and
8 mission, sir.

9 Q. No, no. That's okay, and I appreciate it. And if I say
10 something incorrect, please tell me.

11 A. Yes, sir.

12 Q. How many -- I just want to talk about the time for -- real
13 quickly.

14 How many days did the Air Force have from the first time
15 the inspector general told them that this was a major problem,
16 submitting fingerprints and criminal history data on these
17 convicts and these dangerous people -- how many days from the
18 1997 report passed for them to try to correct it?

19 A. Well over 7,500 days. I don't have the number at the top
20 of my brain, but it was over 7,500 days between. I did a date
21 elapse between when that report got published and the 5th of
22 November of 2017. Not counting the 5th of November, it was
23 over 7,500 days of awareness that this is an issue for
24 security forces and OSI.

25 Q. About how many days did the Air Force have from the time

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1 that Devin Kelley's case file was closed to correct this
2 problem before the -- from the time it was closed to the day
3 of the shooting?

4 A. Not archived but closed?

5 Q. Yes, sir.

6 A. Because this happened at different times.

7 The -- I believe it was -- I'm trying to go back to when
8 it was closed. I believe they closed it -- I know they
9 archived it in April of '13. I'd have to go back to that
10 chart you were looking at.

11 It was about 1,600 days from archive. And then from
12 closure, I believe that was four months earlier.

13 Q. Yes.

14 A. So 120 would be about 17 -- 1,750 days to comply.

15 Q. Devin Kelley purchased his AR-15 at a federally -- a
16 firearm-licensed dealer after passing a NICS background check;
17 is that correct?

18 A. That's correct, sir.

19 Q. First of all, simple, simple question:

20 Would Devin Kelley have had the AR-15 that he used to kill
21 26 people and injure 22 more if the Air Force submitted his
22 fingerprint and criminal history data to the FBI?

23 THE COURT: Your objection?

24 MS. CHRISTILLES: Objection, your Honor. It calls
25 for a legal conclusion.

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1 MR. ALSAFFAR: That's a factual question, Your Honor.

2 THE COURT: So it's a factual question. We've heard
3 it plenty of times. And so it goes with the caveat, assuming
4 the FFL actually complied with the law, would he have had the
5 weapon.

6 MR. ALSAFFAR: Okay.

7 THE COURT: Go ahead.

8 BY MR. ALSAFFAR:

9 Q. Colonel Youngner, I want you to assume for me, based on --
10 well, I don't think we have to assume.

11 The Academy store that sold the AR-15 did submit his
12 information to the FBI, did they not?

13 A. Yes, they did.

14 THE COURT: The assumption would have been that they
15 actually would have sold it no matter what the circumstances
16 were. We really don't know; right?

17 MR. ALSAFFAR: Of course. Of course.

18 THE COURT: But with all that, we've heard this
19 plenty of times. Go ahead and ask the question. Let's get
20 the answer.

21 MR. ALSAFFAR: Thank you, Your Honor.

22 MS. CHRISTILLES: Your Honor?

23 THE COURT: Yeah.

24 MS. CHRISTILLES: May I be heard?

25 THE COURT: Yes.

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1 MS. CHRISTILLES: I will also object because
2 plaintiff has proffered Colonel Youngner as an expert in Air
3 Force protocols. I think whether or not he would have been
4 able to buy a weapon at Academy is far outside of what the
5 plaintiffs have submitted him for as an expert.

6 THE COURT: That's fair enough.

7 You know, so the other part about all this too, as to
8 many of the objections on his testimony as an expert, I mean,
9 this is not a trial to the jury. It's a trial to the bench.

10 And, frankly, I know to discount testimony as I see
11 fit. And so I can take in whatever and disregard whatever.
12 And so I take -- I'm letting lots of this in. It doesn't mean
13 I'm going to give it actually any credence whatsoever,
14 especially as it impinges on legal conclusions.

15 But that said, you know, this is outside now the
16 lines of the testimony that he was proffered for.

17 So any other questions?

18 MR. ALSAFFAR: Yes, I do, Your Honor.

19 THE COURT: Go ahead.

20 BY MR. ALSAFFAR:

21 Q. Okay. I want to now turn to the case file itself and what
22 the Air Force knew about Devin Kelley's character and what
23 they knew about his violent tendencies and his actual violent
24 acts prior to them failing to submit his fingerprints and his
25 conviction to the FBI. Okay?

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1 A. Okay.

2 Q. And I think you've already said that you had an ample
3 opportunity to have, in fact, as you stated in your report,
4 detailed the various instances in which the Air Force
5 documented a variety of violent acts and threats that
6 Devin Kelley made the Air Force aware of while he was there.

7 Do you recall that?

8 A. Yes, I do.

9 Q. Okay. What I'd like to do is just to take the Court
10 through some of those, and I'd like to start with one of
11 Devin Kelley's Air Force files, if we could.

12 So I'd like to look first at Joint Exhibit 21, page 4.

13 Have you had a chance -- this was one of the reports that
14 you reviewed in forming your opinions on what the Air Force
15 knew about Devin Kelley's violence; correct?

16 A. Yes. I recall that is the expulsion or barment order.

17 Q. Okay. We're looking at a document dated March 27th, 2013.
18 And I want to highlight in the first paragraph the statement
19 that says, "Due to Kelley" -- if we look down in paragraph 2,
20 it starts with "Due to Kelley's."

21 Thank you. That's all right.

22 A. Yes.

23 Q. And if you look toward the bottom of that paragraph.

24 A. Yes.

25 Q. All right. Now, in March 2013, the Air Force was aware

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1 that Devin Kelley had an extensive record of violence;
2 correct?

3 A. This summarizes it, yes.

4 Q. He was directing death threats towards not just his
5 domestic partner but his leadership in the Air Force; is that
6 right?

7 A. That's correct.

8 Q. And at this point in time, March 2013, what was the
9 Air Force saying in this letter about whether or not it was --
10 the Air Force was safe from Devin Kelley at Holloman Air Force
11 Base?

12 A. This was -- the Air Force was requesting -- his leadership
13 was requesting he be barred from the base because he presented
14 a threat to the leadership and to public safety on the
15 installation of Holloman Air Force Base.

16 Q. Now, the next paragraph, paragraph 3. So we're talking
17 about in March 27th, 2003 -- 2013, sorry. Paragraph 3, the
18 very first paragraph there, "AB Kelley."

19 The Air Force -- what is the Air Force reporting about
20 Devin Kelley's mental health situation?

21 A. Well, they are describing conduct that also reflects
22 severe mental health problems, and then they're describing the
23 evidence to support that below.

24 Q. Did you have a chance to review as well his multiple
25 mental health facility stays while he was at the Air Force?

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1 A. Yes. Two at Peak, a civilian facility for behavioral
2 health counseling that was off the installation.

3 Q. Okay. And so this severe mental health decline was
4 apparent, in March of 2013, to the Air Force; is that right?

5 A. It was summarized in '13. It was apparent prior to that,
6 as described in the document itself when he was taken to Peak.
7 This was -- this document was written prior to his release
8 from confinement to bar him from the installation.

9 Q. And at this point in time, March 27th, 2013, we're talking
10 about after he's been convicted, after he's served his time,
11 and he's, essentially, a free person; is that correct?

12 A. Well, he's about to be put on appellate leave and released
13 from confinement, which started his pretrial confinement and
14 continued until he served his sentence.

15 Q. So even after he served his sentence and he was about to
16 be a free man, the Air Force had determined that his mental
17 health problems are so severe and his threats of violence are
18 so dangerous that he was too dangerous to the entire Air Force
19 base of Holloman Air Force Base ever to be allowed to enter
20 ever again.

21 Is that fair to say?

22 A. That was the request. And the decision was made a few
23 days later by the installation commander to bar him, based on
24 what's here as well as some additional threats that had been
25 communicated.

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1 Q. All right.

2 A. I think they're described elsewhere in this letter.

3 Q. Now, the next sentence says that he open -- in
4 paragraph 3, it says, "He openly carried a firearm on Holloman
5 Air Force Base and placed a weapon to his wife's head."

6 Do you know who that wife is?

7 A. Tessa, his first wife.

8 Q. Were you able to listen to Danielle Kelley's testimony in
9 trial?

10 A. I was.

11 Q. Okay.

12 A. Yes, I did.

13 Q. Was this similar domestic violence conduct to what he did
14 to Danielle?

15 A. I assess it -- I'm sorry. The counsel has raised an
16 objection.

17 THE COURT: Yeah.

18 MS. CHRISTILLES: Objection, Your Honor. That's
19 outside his expertise. Similar domestic violence conduct, I
20 don't see how that relates to Air Force protocol.

21 MR. ALSAFFAR: I'll rephrase.

22 BY MR. ALSAFFAR:

23 Q. Let me ask it this way, Colonel.

24 Based on your review of the entire file, did Tessa Kelley
25 get a gun pointed to her head by Devin Kelley in 2012-2013?

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1 A. Yes.

2 Q. All right. Based on your review of the testimony and
3 depositions, did Danielle Kelley get a gun pointed to her head
4 by Devin Kelley?

5 MS. CHRISTILLES: Objection, Your Honor. He's
6 leading the witness here.

7 THE COURT: That's sustained.

8 BY MR. ALSAFFAR:

9 Q. All right. Can you tell us whether or not Danielle Kelley
10 had a gun pointed to her head by Devin Kelley?

11 A. Yes. I understand that from her depositions and from her
12 testimony earlier this week.

13 Q. Now, if you look down in paragraph B -- oh, by the way,
14 before I do that, I didn't show you the next page, page 5.

15 If we could look at the signature page, the bottom blue
16 signature page. The bottom blue signature page. Thank you.

17 Who is this that's making this report from the Air Force?

18 A. So that is a captain who works for the staff judge
19 advocate within the 49th Wing staff judge advocate's office.
20 And so it appears he reviewed the work of either a paralegal
21 or law clerk civilian and forwarded this to the installation
22 commander based upon his legal review.

23 Q. It's an Air Force government lawyer; right?

24 A. Yes, that's correct.

25 Q. Let's look at what the government Air Force lawyer said in

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1 paragraph B about Devin Kelley. If you look under B, it's
2 March 2013, "Additional evidence," that sentence.

3 A. Yes.

4 Q. The Air Force attorney states, "Additional evidence of
5 Kelley's high-risk, unpredictable, and criminal behavior
6 includes his history of mental health issues, his
7 preoccupation with weapons, his verbal declaration that he's
8 contemplated offensive attack strategies on both Air Force
9 personnel and organizations, including leadership and security
10 forces."

11 I want to stop right there.

12 What — "offensive attack strategies," what does that mean
13 to you?

14 A. He's looking for a way to harm someone offensively or
15 aggressively.

16 Q. And is it — based on this review in 2013, is the
17 Air Force saying that his offensive attack strategies are not
18 limited to people in his family or domestic situations;
19 they're other people?

20 A. There's also the unit, the leadership. And so his unit
21 and his unit leadership.

22 Q. We're talking about mass violence here; is that right?

23 MS. CHRISTILLES: Objection, Your Honor. Leading.

24 THE COURT: That's sustained.

25

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1 BY MR. ALSAFFAR:

2 Q. Can you tell us whether or not this is, in your view, what
3 we're talking about, mass violence?

4 A. To the extent he was focused on larger organizations and
5 units, yes, I would assess it was. And that is also based on
6 my having read what Devin Kelley reportedly told supervisors
7 about how he would approach them if he had a shotgun, he'd go
8 in and shoot the place up, et cetera.

9 Q. Okay. We'll look at that, but let's finish with this
10 document, the next -- 21, page 5.

11 Actually, let's get to the recommendation part from this
12 Air Force lawyer. If we look down under paragraph 5,
13 "AB Kelley has."

14 The government attorney here states that "AB Kelley has a
15 well-documented history of making threats of physical
16 violence, researching methods of carrying out violence, and a
17 conviction for assaulting his wife and stepson."

18 What does that sound like to you?

19 A. I assess that as a factual predicate for the decision to
20 bar them, that this person has demonstrated violence as
21 evidenced by these matters that are noted above.

22 Q. And did your independent review of this file indicate that
23 Devin Kelley had and was researching methods of carrying out
24 violence?

25 A. Yes. He had, both at Peak and elsewhere.

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1 Q. And would that include thinking through and planning
2 through acts of mass violence while he was at the Air Force?

3 A. As far as assessing how he would go about doing something,
4 I don't have the details other than the summaries,
5 particularly from Peak, and conversations he had with
6 supervisors at the 49th Logistics Readiness Squadron.

7 Q. All right. Well, let's actually look at that planning and
8 researching that he did related to that issue while he was in
9 the Air Force.

10 Let's look at document JEX 21, page 6. It's a new
11 document. This is a few days later from another commander.
12 And let's look at the second page -- I'm sorry, page 7, so we
13 can orient the Court.

14 This is signed by Andrew Croft, Colonel, Air Force
15 Commander.

16 Do you see that?

17 A. Yes, I do.

18 Q. Okay. And if we can look on the first page again, what is
19 this the Court's looking at?

20 A. That is the order approving the request, which was the
21 document you showed me previously. It's an order to not --
22 it's to basically bar Devin Kelley from entering or reentering
23 Holloman Air Force Base indefinitely.

24 Q. Let's look at the first -- keep that up -- the first
25 sentence there and -- starting with "You had repeatedly."

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1 Now, this is addressed to Devin Kelley.

2 The "you" here is Devin Kelley; is that right?

3 A. That's correct.

4 Q. All right. Devin Kelley "had repeatedly threatened the
5 lives of United States Air Force leadership."

6 Do you see that?

7 A. Yes.

8 Q. So at this point, was the Air Force aware that
9 Devin Kelley was threatening, not just one, but multiple lives
10 of United States Air Force personnel?

11 A. That is correct.

12 Q. And then you remember how you talked about you viewed
13 documents regarding Devin Kelley's planning about violence.
14 And I want to show you that in this document.

15 It's the same paragraph. Sorry. Same paragraph.

16 A. Yep.

17 Q. Bottom of the paragraph starting with "During." Can you
18 read today out loud to the Court.

19 A. "During your hospitalization at the Peak, you had searched
20 the internet" --

21 And I'm going to have to change my view. I blocked -- the
22 Court view on the right is blocking the entire thing for me.
23 So bear with me.

24 Q. That's okay?

25 A. Let's see if that does it. Okay.

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1 "During your hospitalization at the Peak, you had searched
2 the internet on a computer for body armor and purchasing of
3 weapons."

4 So that suggested to me that he was -- you know, a tactic,
5 technique, or procedure he wanted was use of body armor in
6 engaging in potential violence.

7 MS. CHRISTILLES: Objection to that opinion, Your
8 Honor.

9 THE COURT: So he's basically just restating what's
10 already in the record, so I can read documents for myself.

11 MR. ALSAFFAR: Okay.

12 BY MR. ALSAFFAR:

13 Q. How many times did Devin Kelley threaten mass violence
14 that the Air Force was aware of at various times during his
15 stay at Holloman Air Force Base?

16 A. Immediately, three come to mind. I'd have to go through
17 the record and count it. You know, the instances where he
18 told a -- his wife, "If I had a shotgun, I'd go in and shoot
19 them all up" is what he told Tessa.

20 The threats made at Peak, I believe. And then the third
21 was prior to release.

22 I guess a fourth was when he told a former supervisor --
23 he communicated to Master Sergeant Bizzack threats, but I
24 don't know if that was just one or a large group of leadership
25 or former leadership.

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1 But there were several, three or more, that the Air Force
2 was aware of.

3 Q. All right. So the Air Force was aware of multiple
4 occasions that they could reasonably anticipate that that is
5 the kind of person that might engage in mass shootings because
6 he threatened it multiple times?

7 MS. CHRISTILLES: Objection, your Honor. Calls for a
8 legal conclusion.

9 THE COURT: So it's actually asking him to speculate.
10 So he's not a psychiatrist or a psychologist, and so you're
11 asking him to speculate as to whether or not Colonel Youngner
12 thinks he would commit mass shootings. That's beyond his
13 scope.

14 MR. ALSAFFAR: All right.

15 BY MR. ALSAFFAR:

16 Q. So at least on three occasions, Devin Kelley threatened to
17 commit mass shootings while he was in the Air Force, and the
18 Air Force was aware of it.

19 Is that a fair summary?

20 A. Yes.

21 Q. They also learned something else about Devin Kelley.

22 In addition to his abuse of Tessa Kelley and the kind of
23 abuse he had with Tessa Kelley, did they also discover -- and
24 then in addition to his mental health -- severe mental health
25 problems and his threats of mass shooting violence on multiple

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1 occasions, did they also discover something else about his
2 past and violence as well?

3 A. Well, I mean, they also had the assault upon his
4 stepson --

5 Q. Oh, right. Right.

6 A. -- in addition to Tessa Kelley and --

7 Q. What I'm referring to is, as part of the OSI
8 investigation, did the Air Force learn about other acts of
9 violence that he had committed against other women?

10 A. They did. When they did their research, OSI, in their
11 investigation, found that there was some preservice drug use
12 that they discovered. And there was also a -- I believe --
13 I'm trying to remember how many. There was at least one
14 instance of an alleged, I'll call it, sexual assault on a
15 dating interest prior to his enlisting.

16 THE COURT: Let me make sure I've got the time line
17 on this right.

18 Is this stuff that the Air Force learned after the
19 shooting, or are you talking about --

20 MR. ALSAFFAR: No. This is what they learned before
21 he was convicted and had on their system every day prior to
22 his conviction all the way up to the shooting, and I'll make
23 that clear on the record. I apologize. That's my fault.

24 THE COURT: I was getting lost on what you were
25 talking about.

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1 MR. ALSAFFAR: I'm going to show you the documents,
2 Your Honor, real quick. Let's start with the first time. And
3 this, Your Honor, is June 18th, 2012.

4 BY MR. ALSAFFAR:

5 Q. The OSI -- Detachment 225 -- and this is JEX 22, page 63.

6 I apologize in advance, Colonel, for the nature of this,
7 what the Air Force learned about Devin Kelley in 2012 and the
8 nature of what they learned, but I think it's very important
9 for the Court to understand the degree and extent of it. So
10 I'm just giving you fair warning, and I know you've reviewed
11 this.

12 Okay. This is June 18th, 2012. This is part of the
13 Air Force's investigation of Devin Kelley. Fair?

14 A. Yes.

15 Q. And just to orient the Court as well, just for the record,
16 if you look on the very bottom, the special agent that's
17 investigating this is Yonaton Holz.

18 Do you see that?

19 A. I do.

20 Q. Let's go back to the main body of the paragraph. And we
21 have redacted the name, so I'm just going to say "victim."

22 Okay, Colonel?

23 A. Yes.

24 Q. I'm going to highlight for you, because you were asking --
25 you said there were several events, but you were asking to

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1 look at the document.

2 On June 18th, 2012, Mr. Holz spoke with the victim and
3 states, "Victim met subject Kelley in 2005 while she was in
4 the seventh grade in New Braunfels."

5 See that?

6 A. Yes, I do.

7 Q. Next sentence, "Victim dated subject D. Kelley for
8 approximately eight months but terminated the relationship due
9 to constant verbal and sexual abuse by subject Kelley."

10 A. Yes, I read that.

11 Q. "Victim tried to end the relationship numerous times, but
12 subject Kelley would state he would kill himself if she did."

13 Do you see that?

14 A. Yes, sir.

15 Q. "Subject Kelley told victim he would kill himself
16 approximately five to eight times throughout the relationship.
17 Subject Kelley made her do things no seventh grader should.
18 Subject Kelley would force victim to give him oral sex by
19 pushing her head down to his groin. Subject Kelley would also
20 force victim to masturbate him."

21 So the Air Force was aware of this on June 8th, 2012,
22 about the nature, degree, and depth of Devin Kelley's
23 problems.

24 Is that fair to say?

25 A. Yes. About five months --

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1 MS. CHRISTILLES: Objection, Your Honor.

2 THE WITNESS: -- before the prosecution and
3 conviction.

4 THE COURT: What's your objection?

5 MS. CHRISTILLES: Counsel is testifying and leading,
6 nature, depth.

7 Is there a question or --

8 MR. ALSAFFAR: There was a question.

9 THE COURT: So I understood the question. The
10 question was, was the Air Force aware of the fact that he
11 was -- he, in 2005, was engaged in a sexual relationship with
12 an underage girl and that Kelley said he would kill himself if
13 she attempted to end the relationship and that the government
14 knew that as of June of 2012.

15 So, yeah, I understood the question.

16 My question is how old was Kelley in 2005?

17 MR. ALSAFFAR: He was 15. He was born in 1991, Your
18 Honor -- 14. 14.

19 THE COURT: So Kelley, at that age -- at that time,
20 is underage himself?

21 MR. ALSAFFAR: Yes, Your Honor.

22 THE COURT: Okay. Thank you.

23 MS. CHRISTILLES: Your Honor, to that point, I would
24 object to relevance of this.

25 THE COURT: So that's overruled.

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1 BY MR. ALSAFFAR:

2 Q. Okay. Let's go to the next one.

3 Was there another victim that the Air Force learned about
4 of Devin Kelley?

5 A. I believe so, yes.

6 MR. ALSAFFAR: Let's go to JEX 22, page 65.

7 And, Your Honor, just to orient you, this is the same
8 Detachment 225 agent, but it's two days later. It's
9 June 20th, 2012.

10 And if we could, again, just blow up the main
11 paragraph, and we'll highlight it for you.

12 BY MR. ALSAFFAR:

13 Q. On June 20th -- sorry, June 20th, 2012, Special Agent Holz
14 interviewed victim. Victim met subject Kelley approximately
15 five years ago at church.

16 So five years prior to 2012, what year would that be,
17 Colonel?

18 A. 2007.

19 Q. So "Victim was 14 years old at the time, and they began
20 dating. Victim stated subject Kelley was the one that pursued
21 the relationship."

22 Go down a couple more lines.

23 "Victim explained Devin Kelley made her do things no
24 seventh grader should be doing at their age. Victim felt her
25 relationship with subject Kelley was sexually and emotionally

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1 abusive.

2 "Subject Kelley sexually abused victim approximately four
3 to five times after they broke up. Subject Kelley would force
4 victim to masturbate him by using verbal abuse to control her.

5 "Subject Kelley would often tell victim she was not good
6 at anything but 'sucking dick.'"

7 I apologize for the language. That's in the record.

8 "Subject Kelley would begin to breathe heavy on the phone
9 and would ask victim to play along. Victim found the act
10 disgusting and would hang up the phone. Subject Kelley would
11 sometimes call victim and hide the fact that he was
12 masturbating from her."

13 Few more lines down.

14 Special Agent Holz notes that "Subject Kelley pulled his
15 penis out of his pants and began masturbating and asked victim
16 to lift her shirt so he could see her breasts. Victim refused
17 to comply with subject Kelley's demands. Subject Kelley
18 climaxed quickly on his hands and rubbed his semen on victim's
19 stomach after lifting her shirt up."

20 Do you see that?

21 A. Yes, I do.

22 Q. Okay. So the Air Force was aware of this conduct of
23 Devin Kelley on June 20th, 2012, on another victim?

24 A. Correct. Yes, they were aware.

25 Q. All right. I want to show you a third victim that the

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1 Air Force was aware of prior to the shooting and prior to his
2 release from Holloman Air Force Base.

3 I'm going to show you JEX 22, page 67.

4 And, Your Honor, to orient to you again, it's the same
5 case agent, Holz. It's a few days later, June 26th, 2012.

6 I'm going to highlight the first paragraph. Just the
7 first half of that paragraph.

8 Shawn, that should be enough. Thank you.

9 Again, you reviewed this in forming your opinions in this
10 case, did you not, Colonel Youngner --

11 A. I did.

12 Q. -- about what the Air Force was aware of about his
13 conduct; correct?

14 A. Right. The other investigative leads that the agents
15 followed up on in developing the case file prior to the
16 court-martial.

17 Q. Okay. On June -- I'm reading from JEX 22.

18 "On June 26th, Special Agent Holz interviewed victim.
19 Victim met subject Kelley and began dating him during her
20 freshman year of high school in 2008. Victim and subject
21 D. Kelley ended the relationship because they constantly
22 fought and subject Kelley moved to enlist in the Air Force.

23 "Victim described her relationship as violent and
24 aggressive. Victim and subject Kelley would often strike each
25 other if one or the other said something to infuriate the

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1 other."

2 A few lines down.

3 "Subject Kelley forcefully took victim's sexual virginity.
4 Victim was 16 years old at the time and did not know what to
5 do in regards to having sex with subject D. Kelley. Victim
6 tried pushing subject Kelley away, but subject Kelley was
7 stronger than she was. Subject Kelley inserted his penis into
8 victim's vagina and penetrated her hymen."

9 Is this excessively violent conduct by Devin Kelley that
10 the Air Force was aware of?

11 A. This is conduct the Air Force was aware of, the sexual
12 violence.

13 Q. Is it heinous violence?

14 MS. CHRISTILLES: Objection, Your Honor.

15 THE COURT: That's beyond his -- next question.
16 Sustained.

17 BY MR. ALSAFFAR:

18 Q. Let me show you a mental health record that was part of
19 the Devin Kelley file and what the -- what you reviewed and
20 what the Air Force was aware of prior to releasing him and
21 prior to the shooting.

22 It's JEX 22, and it's page 591.

23 Now, you recall that -- and the date on this is April 26,
24 2011, but I believe that it was just a typo by the mental
25 health facility. It's 2012.

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1 But you reviewed this document as part of your review of
2 the Devin Kelley case file; correct?

3 A. I did. And I also noted the date stamp at the bottom
4 indicated a 2012 date.

5 Q. Yeah. In fact, let's just be clear, because I want the
6 Court to understand exactly where this document is coming
7 from.

8 If we actually look at JEX 22, page 590.

9 This document I'm about to show you is from the AFOSI
10 April 26th, 2012, case file on Devin Kelley; is that right?

11 A. That's correct.

12 Q. Okay. If we could skip to 22, 592.

13 You're aware that this facility and that the Air Force was
14 aware that he had actually had some pretty extensive mental
15 health testing and behavioral testing done while he was at
16 Holloman Air Force Base and that the Air Force was aware of;
17 is that true?

18 A. That's true.

19 Q. Okay. And I --

20 A. It's reflected here.

21 Q. And I want to show you that that's what's reflected here.

22 After their testing of his mental health while he was in
23 the Air Force, what was the conclusion under "control scale"
24 for Devin Kelley?

25 A. This reflects that maximum risk range that put him at the

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1 98th percentile of being controlling, and it describes what
2 that definition means beyond that.

3 Q. Let me highlight the middle down in that same paragraph,
4 "This person's."

5 Do you see that?

6 A. Yes.

7 Q. Can you read that sentence for the Court, please.

8 A. "This person's significant other may be held in bondage
9 through intimidation and raw violence."

10 Q. So the Air Force, in April 2012, was aware that
11 Devin Kelley and was maximum risk range of control and a
12 maximum risk range for raw violence; is that right?

13 A. That's correct. That's elsewhere.

14 Q. In the same document, he had some more testing done, and
15 it has some conclusions from that behavioral testing under
16 "violence scale."

17 It's a test for violence scale that the Air Force was
18 aware of; is that correct?

19 A. That's correct. And, again, he was a high-risk assessment
20 at the maximum risk range.

21 Q. Well, I want to be clear. It wasn't high risk; it was
22 maximum risk range.

23 Is that what the record shows?

24 A. Right. I mean, it says both. But, yes, maximum risk
25 range in bold, and risk percentile is 93. And his pattern on

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1 the scale is in the high risk, 90 to 100 percentile range, at
2 93. And it goes on to describe that.

3 Q. If we look under high-risk scores, which is what his score
4 is, what did the Air Force learn about his mental health risk
5 in April 2012 from his testing?

6 A. It described that he can be hostile, he can be violent, he
7 can be dangerous and should be considered dangerous.

8 Q. Let's look at another conclusion that this mental health
9 testing determined for Devin Kelley when he was in the
10 Air Force and that the Air Force learned about him the end of
11 April 2012.

12 And it's on page -- it's JEX 22, page 593.

13 If we look under the category of "stress coping scale,"
14 what did the Air Force learn about Devin Kelley's mental
15 health status in terms of coping with stress? What range did
16 he score on?

17 A. Again, in the maximum risk range, which indicated he had a
18 poor ability -- inability, if you will, to cope with stress.
19 And it describes how that contributes to his impaired
20 adjustment.

21 Q. How did the mental health testing that the Air Force was
22 aware of in April 2012 categorize the level of this
23 adjustment, this impairment?

24 A. Again, in the high-risk range.

25 Q. And what did they conclude about -- it's highlighted

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1 there. Can you read that into the record.

2 MS. CHRISTILLES: Your Honor.

3 THE WITNESS: "Stress or this person's inability to
4 cope with" --

5 THE COURT: One second.

6 THE WITNESS: Please. I'm sorry.

7 MR. ALSAFFAR: That's okay.

8 MS. CHRISTILLES: I'm going to object.

9 Colonel Youngner is simply reading from the record. He has
10 not been qualified as a medical provider, a mental health
11 professional, or any such qualifications that would qualify
12 him to read through these mental health records.

13 THE COURT: That's overruled. But I'm not taking any
14 of his testimony as him giving any expert testimony on that
15 fact. I'm limiting it solely to what Detachment 225 knew on
16 or about April 26th, 2012, about Devin Kelley's mental health.

17 MR. ALSAFFAR: That's right, Your Honor. In what we
18 do, we'll limit it to that.

19 BY MR. ALSAFFAR:

20 Q. You were in the middle of finishing reading that into the
21 record, Colonel, starting with "Stress."

22 A. I'll start over.

23 "Stress or this person's inability to cope with stress is
24 contributing to a seriously impaired adjustment."

25 Q. So this -- you remember the first page of this document we

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1 showed you was the AFOSI Detachment 225 coversheet showing
2 that Agent Holz obtained this record.

3 Do you remember that?

4 A. I do.

5 Q. When we were talking earlier about the supervisory
6 contacts -- you know, the 130, 180-plus contacts of this
7 file -- at some point in time, from April 2012 all the way to
8 November 5th, 2017 -- or let's -- let me rephrase that.

9 At some point in time, from April 2012 to archival of this
10 file, this information that we just read about his mental
11 health impairment and testing was available to the supervisory
12 agents every single time they touched this file.

13 Is that fair to say, based on your review?

14 A. Yes, because Holz put it in the file, and they had to
15 review it -- well, it was available for their review, yes.

16 Q. And I know it seems simple. But when we were talking
17 about investigative case sufficiency and we were showing the
18 judge -- the Court the audit trails that showed access to the
19 file, what we're looking at that is file.

20 Is that fair to say?

21 A. That's correct. It's the investigative file. Then it
22 goes into the report of investigation.

23 Q. And I'm sorry if this seems obvious, because you did this
24 a lot in the Air Force, but most of us did not.

25 When you -- because I didn't ask this on those questions.

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1 When we went through the rapes of these minor girls with
2 Devin Kelley that the Air Force was aware of, were those
3 violent acts in the file every single time from those dates of
4 June 2012 until case archival for all those supervisory agents
5 at Detachment 225 to review and look at?

6 A. They should have been put in the file on the date of the
7 report that Agent Holz or the case agent developed the lead.
8 So I believe that's correct, yes. It was available for their
9 review.

10 Q. Okay.

11 A. And -- well, yes. That's all. I'm sorry.

12 Q. That's okay. I want to -- I'm close to wrapping up here,
13 Colonel.

14 I want to talk about -- a little bit earlier, we talked
15 about why this had happened in terms of the supervisory
16 misses, and we had spoken about Colonel Hudson and then
17 Commander Boyd.

18 I want to show you -- did you review -- I'm sorry. I
19 think you said you did.

20 But did you review the -- one of the supervisory agents in
21 charge, Vince Bustillo's, deposition; correct?

22 A. I did, yes.

23 Q. And he was one of the supervisory agents who was
24 responsible for reviewing Devin Kelley's case files as well;
25 correct?

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1 A. Yes, sir.

2 Q. Okay. And did he provide -- I want to show you a clip
3 from his testimony and ask you -- relating to this issue of
4 supervisory review.

5 If we could play Bustillo's deposition, page 120, line 14
6 through line 121. It's a short clip, page 121, line 4. So
7 page 120, line --

8 (Clip was played.)

9 MS. CHRISTILLES: Your Honor.

10 THE COURT: Stop it. Yes?

11 MS. CHRISTILLES: I'm just trying to verify whether
12 or not this video has actually been admitted.

13 MR. ALSAFFAR: It has. Your Honor, everything we're
14 playing is only something that's already been preadmitted.

15 THE COURT: So what is this number?

16 MR. ALSAFFAR: Let me find the exhibit number, Your
17 Honor. I believe it's 3 -- trying to make sure I don't give
18 you the ECF file number versus the joint exhibit number. I'm
19 giving you the ECF file number. It's Plaintiffs' 93.

20 THE COURT: This is Plaintiffs' 93?

21 MR. ALSAFFAR: Yes, Your Honor. These were admitted,
22 I think, on day one.

23 THE COURT: Plaintiffs' 93, trial deposition
24 designations of Yonaton Holz?

25 MR. ALSAFFAR: Oh, no. This is Bustillo. Sorry.

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1 It's Plaintiffs' 88, Your Honor. I apologize.

2 THE COURT: 88 has been admitted, plaintiffs' trial
3 deposition testimony trial of Vince Bustillo.

4 MS. CHRISTILLES: By video, Your Honor?

5 MR. ALSAFFAR: Yes. I believe this is one of our
6 video -- I don't think that matters, Your Honor. It's
7 testimony.

8 THE COURT: I mean, just -- there's nothing in the
9 video that's not in the deposition transcript; right?

10 MR. ALSAFFAR: That's right.

11 THE COURT: Go ahead.

12 MR. ALSAFFAR: Thank you.

13 (Clip was played.)

14 MR. ALSAFFAR: Start over. Thank you.

15 (Clip was played.)

16 BY MR. ALSAFFAR:

17 Q. Colonel, is it acceptable for a reasonably prudent
18 supervisory agent to supervise his agents with a "they know
19 how to read" mentality at Detachment 225?

20 A. I assess that it is not. The description just given by
21 former Special Agent Bustillo is not consistent with, frankly,
22 Air Force instructions or policy on leadership. And an
23 ordinary, reasonably prudent supervisor would not expect your
24 agents to just do it for themselves and not be led. They need
25 to be led.

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1 That's the whole point of having a special agent in charge
2 or a superintendent or a detachment commander is to emphasize
3 the significant items both for investigative sufficiency but
4 also policies that are pushed down from DODIG or the secretary
5 of the Air Force or others. At that time, sexual assault was
6 a very important policy matter.

7 THE COURT: He's gone beyond the question.

8 MR. ALSAFFAR: I agree with the judge. I just put my
9 hand up.

10 Thank you, your Honor.

11 THE WITNESS: I apologize.

12 BY MR. ALSAFFAR:

13 Q. That's okay.

14 SAIC Bustillo also said, "I shouldn't have to lead."

15 Is that reasonably prudent for a supervising agent at
16 Detachment 225 regarding these instructions for fingerprint
17 and conviction data to supervise by saying, "I shouldn't have
18 to lead"?

19 Is that -- you can answer.

20 MS. CHRISTILLES: Your Honor, objection. That wasn't
21 in the video. He's talking about supervisory duties in
22 general.

23 THE COURT: So he said, "I shouldn't have to lead."
24 And then he talked about minute details.

25 So I don't think he said he shouldn't lead at all,

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1 but he qualified it as to minute details.

2 So do you want to rephrase your question?

3 MR. ALSAFFAR: You bet. You bet.

4 Thank you, Your Honor.

5 BY MR. ALSAFFAR:

6 Q. Well, first of all, are -- fingerprint submissions and
7 criminal history data, should that be considered a minute
8 detail by a supervisory agent?

9 A. I assess that it's -- because it is on the checklist for
10 supervisors, it's not a minor point. And so, no, it's not a
11 minute detail, or else the OSI wouldn't have put it on that
12 very important checklist -- both checklists.

13 So I disagree with that characterization. It is an
14 important detail, not a minor detail.

15 MR. ALSAFFAR: Your Honor, is it okay if I have a
16 five-minute break just to go over -- I think we're concluding
17 here, but I just want to make sure and confer with my counsel.

18 THE COURT: Can we get through cross by today?

19 MS. CHRISTILLES: Your Honor, I don't even know what
20 time it is.

21 THE COURT: It's 3:20.

22 MS. CHRISTILLES: I'm not going to promise, Your
23 Honor, I will get through my entire cross today. I can
24 certainly start, but I think it might take a couple of hours.

25 THE COURT: Okay. Let's take a ten-minute break.

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1 (Recess.)

2 MR. ALSAFFAR: Just a couple more questions, and I'll
3 be done. May I proceed?

4 THE COURT: Yes.

5 BY MR. ALSAFFAR:

6 Q. Colonel, can you see me? Can you hear me?

7 A. I can hear you and see you, yes, sir.

8 Q. Thank you, sir.

9 Okay. We were talking about April 2012 and some of those
10 records in the case file. I want to show you Joint Exhibit
11 Number 9.

12 A. Okay.

13 MR. ALSAFFAR: And just show the first -- let's just
14 jump straight to it, Joint Exhibit 9, page 3. We'll put that
15 up on the screen for you.

16 THE WITNESS: Yes, sir.

17 MR. ALSAFFAR: Joint Exhibit 9. Thank you.

18 BY MR. ALSAFFAR:

19 Q. If you look at the bottom paragraph there, can you read
20 that.

21 This states that May 14th-15th, 2012, so about two weeks
22 after that last mental health record, Holloman Air Force Base
23 High Risk for Violence Response Team convened to discuss
24 Kelley's mental health concerns.

25 Do you know what a High Risk for Violence Response Team

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1 is?

2 A. Yes. It's a multidiscipline team on an Air Force
3 installation involving typically mental health, unit
4 commander, legal, and other services or helping organizations
5 that are involved with care for airmen on an installation.

6 Q. Okay. And the high risk for violence team -- let me
7 reread this.

8 "Kelley's squadron leadership" -- what does "squadron
9 leadership" mean?

10 A. It typically means the commander and the first sergeant,
11 maybe their section supervisor as well. So the lieutenant
12 colonel or major, as a commander, and then a first sergeant or
13 senior noncommissioned officer.

14 Q. "Kelley's squadron leadership and his mental health
15 providers feel that he is a major threat to commit an act of
16 violence, and is currently institutionalized for mental and
17 emotional instability."

18 So that was a couple of weeks after the last document I
19 show you regarding his mental health test; correct?

20 A. I'd have to compare them. But, yes, I recall that it was
21 around that same time.

22 Q. I want to show you one of the actual records for this High
23 Risk for Violence Response Team.

24 This is JEX Number 365, and it's page 150. If we could
25 highlight that whole top section and just pull that up for the

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1 colonel.

2 What's the date of this letter -- I'm sorry, this record?

3 First of all, can you tell us what the date is and what
4 record it's from?

5 A. Yes. It's dated 30 May 2012, and family advocacy
6 office -- typically, family advocacy convenes the High Risk
7 for Violence, you know, Response Team. So it's under their
8 auspices. They often fall under the medical group.

9 Q. This record from Devin Kelley's Holloman Air Force Base
10 records states that HRVRT held -- is that -- what is HRVRT?

11 A. High Risk for Violence Response Team.

12 Q. Okay. "High Risk for Violence Response Team held at the
13 request of the FAO."

14 What is FAO?

15 A. Family advocacy office.

16 Q. Okay. I'm going to skip to the next sentence. It says,
17 "The meeting included ADMs CC" --

18 What does that mean?

19 A. The active duty member's commander. So ADM, active duty
20 member. CC is an Air Force abbreviation for commander.

21 Q. -- "first sergeant, SF" --

22 What does SF stand for?

23 A. Security forces representative, someone from the
24 49th Security Forces Squadron.

25 Q. -- "OSI" --

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1 What does that stand for?

2 A. Office of Special Investigations would have been Det 225
3 at Holloman.

4 Q. -- "JAG" --

5 What does that stand for?

6 A. The judge advocate general office at Holloman.

7 Q. -- "TM" --

8 Do you know what that stand for?

9 A. I believe it stands for transportation management, but I'm
10 not clear on that. So I would have to --

11 Q. Was Devin Kelley in the Logistics Readiness Squadron or
12 traffic --

13 A. He was in the Logistics Readiness Squadron, and traffic
14 management was a subordinate section. So that's what I recall
15 from my military experience. That's what I would assume "TM"
16 means, without asking anybody about this particular meeting.

17 Q. So this meeting -- this High Risk for Violence Response
18 Team included several supervisory members of the Air Force,
19 including his direct command and security forces and OSI;
20 correct?

21 A. That's correct.

22 Q. All right. Next sentence, "It was determined by security
23 forces and OSI that ADM" --

24 And "ADM" is Devin Kelley; right?

25 A. Right, the active duty member, in this case, is referring

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1 to Devin Kelley.

2 Q. "It was determined by security forces and OSI that ADM is
3 a danger to the community given his past statements and
4 possibly a danger to FM/W."

5 What does "FM/W" means, if you know?

6 A. So to family members. And I assume "W" was wife.

7 Q. So May 30th of 2012, the Air Force held in a High Risk for
8 Violence Response Team on Devin Kelley and determined that he
9 was a danger to the community -- security forces and OSI
10 determined he was a danger both to the community generally and
11 to his specific domestic partner.

12 Is that fair to say?

13 A. Yes.

14 Q. And it also concluded that Devin Kelley -- the Air Force
15 concluded that Devin Kelley, in May of 2012, was also a danger
16 to family as well; correct?

17 A. Yes, that's --

18 MS. CHRISTILLES: Objection, Your Honor. Leading the
19 witness, but...

20 THE COURT: That's sustained.

21 BY MR. ALSAFFAR:

22 Q. Did the Air Force High Risk for Violence Response Team
23 determine that Devin Kelley, on May 13th, 2012, was also a
24 danger to his family?

25 A. That's the plain meaning, yes, of that sentence.

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1 It was determined by security forces and OSI that
2 Devin Kelley was a danger to the community given his past
3 statements and possibly a danger -- so the qualifier was
4 possibly a danger to family.

5 MR. ALSAFFAR: Your Honor, pass the witness.

6 THE COURT: Any cross?

7 MS. CHRISTILLES: Yes, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. CHRISTILLES:

10 Q. Good afternoon, Colonel Youngner. Can you hear me okay?

11 A. Yes, ma'am. I can. Good afternoon.

12 MS. CHRISTILLES: I'm just looking at the court
13 reporter.

14 Can she hear me okay?

15 THE REPORTER: Yes, ma'am. Thank you.

16 BY MS. CHRISTILLES:

17 Q. Colonel Youngner, I just want to go through a little bit
18 your CV. I know you talked to plaintiffs' counsel about that
19 already. Okay?

20 A. Yes, ma'am.

21 Q. So it's fair to say that from 1989 to 1991, according to
22 your CV, you list yourself as trial counsel; correct?

23 A. Yes, ma'am. I believe so. I have not opened my file. I
24 do have my report. But just from memory, yes, ma'am, that
25 would be correct.

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1 Q. As trial counsel, you are the judge advocate meeting with
2 the case agent to go over the case file; correct?

3 A. Yes, ma'am, that's correct.

4 Q. But your job title at that time was not actually trial
5 counsel, was it?

6 A. It wasn't because the -- again, no, it wasn't, to answer
7 your question.

8 Q. In fact, you were the chief of claims?

9 A. I was the chief of claims, initially. And then I went
10 through other assignments while I was also serving as a trial
11 counsel.

12 The Air Force approaches this practice different than the
13 other services, but I don't want to -- I'm sorry. I'll stop
14 right there. I answered your question.

15 Q. That's right. You worked on environmental law, labor law,
16 and claims.

17 Those were your prime duties; correct?

18 A. When I wasn't doing a court-martial. When we were doing a
19 court-martial, that case took priority over the -- if you
20 will, the assigned duty you had.

21 But, yes, ma'am, my primary duty on my officer evaluation
22 reports was as initially chief of claims and then, I believe,
23 chief of labor and environmental law during that two-year
24 period.

25 Q. And during that two-year period, you only tried about four

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1 court-martials as second chair; correct?

2 A. I'd have to go back and look at the count, but it was
3 somewhere in that range of four to six. There were also some
4 discharge board proceedings.

5 So, yes, ma'am, that's a fair, you know, summary. It's in
6 the ballpark.

7 Q. So three or four cases where you were working with OSI
8 agents going over their case file?

9 A. Yes, ma'am. But also there were cases that were disposed
10 of alternately where I worked pretty closely with OSI in where
11 a decision was made not to take it to a court-martial but an
12 alternate disposition.

13 So there were probably another -- about twice that --
14 about, I'd say, eight cases that I worked with them pretty
15 closely, four of them went to court-martial.

16 Q. Fair to say, though, you weren't worked with OSI case
17 agents on a daily basis?

18 A. At that time in my career, not on a daily basis. I was
19 when I was on a court -- even that, no, I can't say daily. It
20 peaked -- it ebbed and flowed depending upon where we were on
21 preparing for trial.

22 Q. Okay. In 1991, you transitioned over to the role of area
23 defense counsel?

24 A. Yes, ma'am.

25 Q. In your position as a defense counsel, you're defending

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1 airmen excused of either misconduct or a crime; correct?

2 A. Yes.

3 Q. As a defense attorney, you certainly weren't meeting with
4 OSI agents to help them develop the legal sufficiency of their
5 case; correct?

6 A. That's correct. I was doing just the opposite. I was
7 challenging their investigative sufficiency.

8 Q. In 1992, you became a circuit defense counsel?

9 A. Yes, ma'am.

10 Q. Held that position for two years?

11 A. Yes, ma'am.

12 Q. As a circuit defense counsel, you certainly weren't
13 working with OSI agents to develop the legal sufficiency of
14 their case; correct?

15 A. Again, that's correct. I was just questioning their
16 challenging the legal sufficiency as I reviewed a case for
17 defense.

18 Q. So you wouldn't have been looking through their case file
19 for fingerprints; correct?

20 A. Actually, I -- in general, that's correct. I looked
21 through their case file as a defense counsel for gaps in the
22 elements-of-proof worksheet. If, however, I see that they
23 didn't have probable cause -- and this occurred on a couple of
24 instances -- or they made mistakes with the constitutional
25 rights of an accused, then we'd use that at trial to either

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1 suppress evidence or take other actions or to pursue alternate
2 dispositions.

3 So we did review the entire case file. And if I saw an
4 error -- I will tell you I never saw missing fingerprints in
5 those cases that I reviewed.

6 Q. Okay. And I think that was my question, whether or not
7 you were looking for fingerprints in the OSI case file.

8 A. It would be -- I was looking at it overall. I was not
9 going into it just to look for fingerprints. I was going into
10 it to look for overall investigative sufficiency, but that
11 would include fingerprints, on occasion.

12 Q. Okay. And we'll talk a little bit more about that in a
13 moment.

14 A. Yes, ma'am.

15 Q. In 1994, you became a deputy SJA; correct?

16 A. Yes, ma'am.

17 Q. Held that position for six months?

18 A. Yes, ma'am.

19 Q. As a deputy SJA, you're second in the supervisory chain of
20 the judge advocates assigned to the office; correct?

21 A. That's correct.

22 Q. You have a whole host of duties as a deputy SJA; correct?

23 A. To some extent; though, my case was unique. But overall,
24 that's correct, in general, for the Air Force.

25 But that was not the case for me. And I can explain why,

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1 if you want to know.

2 Q. Well, I think you tried a couple of cases as deputy SJA,
3 primarily because you had a leftover defense case; correct?

4 A. As a deputy SJA, I tried -- I prosecuted three general
5 courts-martial at Rein-Main Air Base where I was extensively
6 working with the OSI agents, as described before.

7 I also had a major negligent homicide case with the
8 Blackhawk shoot-down that I was defending. So that's why I
9 didn't start out as the staff judge advocate for six months
10 because I was toggling between one case as a defense counsel.

11 And the other three cases at Rein-Main were as a
12 prosecutor. So I was traveling back to the States for the
13 defense counsel role.

14 Q. Okay. And then after six months, you transitioned into
15 the staff judge advocate role?

16 A. Yes, ma'am, that's correct.

17 Q. As a staff judge advocate, you are no longer trying the
18 cases; correct?

19 A. That's correct, yes, ma'am.

20 Q. In fact, you no longer sit down with the case agents to
21 discuss the legal sufficiency of their case file?

22 A. No, ma'am, that's not true, especially at a small
23 installation line Rein-Main. At one point, we were down to
24 three judge advocates there. They were looking to downsize
25 and then close the base.

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1 So long story made short is we would sit down and do a
2 cops-and-robbers meeting with the OSI, and usually the --
3 well, and we would do a status and discipline meeting
4 involving OSI and security forces.

5 So those two meetings were opportunities for us to work,
6 though, the status and discipline wasn't the detail that you
7 were just asking about. But the cops-and-robbers meeting, we
8 called it, we would get into investigative sufficiency. And
9 it would be myself and the security forces squadron commander
10 and the OSI det commander or superintendent along with
11 supporting staff.

12 And that was an important meeting for us. It varied from
13 installation to once a week to once a month. I'd say, on
14 average, it was more like once a month.

15 Q. Okay. At the cops-and-robbers meeting, though, OSI
16 doesn't bring their entire case file, do they?

17 A. Unless there was one that was a command emphasis item,
18 they do not. That's correct.

19 Q. Now, when we're talking about an OSI file, they might have
20 the report of investigation; correct?

21 A. It depends on what they want to bring. They would have
22 the report of investigation, if it's completed. They would
23 have agents' notes. There's typically a six-part folder on
24 the hard -- I'm dating myself now, but -- so it really
25 depended upon what the command was interested in talking about

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1 or the -- for cops-and-robbers, what they wanted to compare
2 and get into.

3 If we had a court-martial coming up, we might spend more
4 time on that. And what I would do then is I had the trial
5 counsel with me. And, frankly, we had this management
6 meeting, and then I would back off and let the trial --
7 literally sometimes leave so the trial counsel could stay
8 there and work with the OSI agent.

9 Anyway, I don't want to go explaining too much. I just
10 want to make sure I'm responsive to your questions.

11 Q. So it's your testimony that during a cops-and-robbers
12 meeting, OSI would bring their entire case file, to include
13 their agent notes and the file with the fingerprints in it?

14 A. It is -- so every time, no. On occasion, possibly. I
15 would say it is more likely than not they would not bring the
16 entire case file.

17 But if we were -- I don't want to get off on war stories
18 or anecdotes to save the Court's time. But I can think of
19 specific examples where we would bring the entire case file
20 because we had an issue. And so to pursue that issue, it was
21 a good use of our time to work out the concerns between the
22 prosecution team and the investigative team.

23 There might be a confidential source that they don't want
24 to reveal to us who we want to interview. And if we're going
25 to get the successful drug prosecution done, I need my trial

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1 counsel to be able to talk to the confidential source.

2 And so those were the kind of issues we'd hammer out at
3 some of these meetings, and they would bring the whole file.

4 Q. Do you recall telling us during your depositions that it
5 was like pulling teeth to get the entire OSI case file?

6 A. It often was, especially as you're a junior trial counsel.
7 You might be able to sit down with an agent, but that was --
8 there was a love-hate relationship at times between the SJA's
9 office and the OSI office, even though we're all on the same
10 team.

11 Q. In fact, there's also a healthy tension between the
12 prosecutors, or the trial counsel, and the staff judge
13 advocate at the case; correct?

14 A. Hmm. I don't know that I would describe it that way.
15 There can be.

16 I mean, clearly, the staff judge advocate is their rater,
17 their supervisor. So in that regard, there might be some
18 discomfort when you ask tough questions of a subordinate about
19 have you -- you know, why don't you -- I use an
20 elements-of-proof checklist with my attorneys. And if they
21 haven't completed that trial brief, that checklist, they're
22 going to get some hard questions.

23 So that, I think, would be fair to characterize as,
24 perhaps, tense.

25 Q. Colonel Youngner, didn't you actually say in your

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1 deposition, "In fact, because you are advising command, there
2 is often a healthy tension between the prosecutor and the
3 staff judge advocate looking at a case and the case agents"?

4 A. Yes. Describing the tension between the JA side, on one
5 hand, and the case agents, on the other.

6 So I think it depends on where you put the comma in that
7 clause, but I was putting the SJA and the prosecutor together
8 on one side, the OSI agents on the other.

9 Q. So there's a healthy tension with the case agents?

10 A. Yeah, I think there can be. And then with the DetCo or
11 superintendent who wants to -- you know, we're each kind of
12 protecting our rice bowl of our subordinates. And where we
13 break down those barriers and have good working relationships,
14 we get a lot more done. And we were able to do that
15 effectively, for example, at Rein -- well, at other
16 installations. I'll just stop there.

17 Q. But you couldn't be thoroughly involved in the case, as
18 the SJA, because you would eventually have to write the staff
19 judge advocate's recommendation for the commander; correct?

20 A. Yes, ma'am, that's -- I could not try the case. In fact,
21 it got to the point where I realized my limitations, so I
22 would not sit in and observe the court-martial because I found
23 myself wanting to get up and object. And, you know, I can't
24 run it for them.

25 So I left them alone to do their job and trusted they were

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1 prepared, and it was just more appropriate that way.

2 Q. Because you had to write that staff judge advocate
3 recommendation; correct?

4 A. Well, you have to objectively assess everything in there
5 when you write that recommendation, yes, ma'am.

6 And so the military justice system does have a unique role
7 where the staff judge advocate recommends to the convening
8 authority, initially, whether to prefer or refer the charges
9 to begin with. Then when the whole case is done, makes a
10 recommendation as to disposition, which is the staff judge
11 advocate recommendation that you're referring to.

12 And, you know, there are instances where you may recommend
13 a disposition that is, perhaps, more lenient than what was
14 decided at the trial.

15 Q. So it's safe to say that after 1994, you never held a
16 position as a trial counsel again in the military; correct?

17 A. I believe that's correct, yes, ma'am. And --

18 Q. And the --

19 A. I'm sorry.

20 Q. And the NICS system became operational in 1998; correct?

21 A. As I understand the Brady Act, it was implemented after
22 that was passed, yes, ma'am.

23 Q. During your career, you have never been involved in a case
24 where someone who was prohibited from purchasing firearms was,
25 nonetheless, able to purchase firearms; correct?

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1 A. I believe that's correct. One caveat to that. I did
2 represent, in my civilian practice, someone who was registered
3 as a firearms offender. It was the Williams trial, if you
4 look at that in my CV. That's since I retired in 2014.

5 He was convicted of rape, and we were able to secure an
6 acquittal on appeal and then at retrial. And I did advise him
7 on how to proceed with basically getting -- actually getting
8 untitled and removed from the database. So that's the only
9 instance I've had prior to -- in this area prior to being an
10 expert for the plaintiffs in this case.

11 Q. And I think that's a good point, Colonel Youngner.

12 That instance where you were trying to get your client
13 removed from the NICS database, that was the first experience
14 you'd ever had reviewing any of the regulations dealing with
15 the Air Force or the DOD's responsibility to submit criminal
16 history data before this case; correct?

17 A. Not exactly. Just from a broad-brush perspective, as we
18 had -- so we would do annual continuing legal education for
19 staff judge advocates. I also attended a staff judge advocate
20 course and then taught at it later.

21 So these requirements -- for example, you'll see on the
22 charge sheet -- well, excuse me -- on the report or result of
23 trial for Devin Kelley DNA processing required, domestic
24 violence offense.

25 So there were -- under Air Force Instruction 51-201, which

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1 is the Administration of Military Justice, there would have
2 been changes in effect requiring compliance with these
3 reporting requirements. There was, again, in this case
4 some -- so let me stop and answer your question.

5 I did have exposure to these regulations and requirements
6 in my capacity as a supervisory staff judge advocate. Though,
7 as I -- I don't want to overstate my credentials. I just want
8 to make it clear that as a supervisory SJA, I made sure my
9 NCOs were following checklists at the general court-martial
10 convening authority level.

11 So at 9th Air Force, for example, or at the Air Force
12 Special Operations Command, I would review all general
13 court-martials and do the SJA recommendation. I would have to
14 check our checklist and do those -- kind of make sure we
15 complied with these requirements.

16 The JAG corps didn't have that requirement to submit the
17 data, but it was -- it was something I was aware of, at least
18 in my role as a staff judge advocate, of these requirements.
19 But I was not responsible for submitting that data. And so I
20 was not into the details of who had to submit it when, but I
21 was familiar with the regulations.

22 Q. Nor were you extremely -- I'm going to quote you --
23 extremely familiar with DODI 5505.11 before this case;
24 correct?

25 A. That's correct, yes, ma'am.

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1 Q. In fact, the first time you actually familiarized yourself
2 with that publication was in preparation for this case?

3 A. I don't agree with that. I'm pretty certain -- and check
4 what I've said in the deposition before.

5 But I recall having been familiar with the DOD -- just
6 generally about DIBRS, in particular, as a requirement and a
7 program. And, frankly, when I was at AFCENT, we began to do
8 biometric data on overseas installations.

9 And so there was some question about what we could collect
10 on civilian employees, particularly third-country nationals
11 overseas. And so I was aware, but for different reasons,
12 of -- generally of the DOD instruction.

13 Q. Okay.

14 A. But I don't want to -- I wasn't intimately familiar with
15 it. No, ma'am, not like I am now with having prepared for
16 this.

17 Q. All right. You also talked about AFOSI Manual 71-121;
18 correct?

19 A. Yes, ma'am.

20 Q. During your time in the Air Force, you were not familiar
21 with any of the written OSI policies and procedures; correct?

22 A. I was not given -- I can't -- no, that's too broad of a --
23 you know, not familiar with any? I was rarely able to obtain
24 a complete copy -- I don't know that I ever obtained a
25 complete copy of those instructions or handbooks, ma'am.

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1 However, as issues came up on cases, we would be given
2 access to certain matters. And we would also have to
3 coordinate, as staff judge advocates, with the OSI staff judge
4 advocate. So there was actually a JAG at Headquarters OSI in
5 Quantico who we would talk to.

6 Again, if we had any problem with getting a confidential
7 informant disclosed or if we had some discovery concerns
8 working with the OSI agents. Then we would get into a
9 back-and-forth about what we were allowed to see and know.

10 But to be clear, I wasn't fully aware of those
11 instructions on the OSI side. I knew they existed. I didn't
12 have the full contents of those.

13 Q. Because those publications are restricted-access items?

14 A. Yes, ma'am, that is correct.

15 Q. In fact, when you were in the Air Force, it took a court
16 order to obtain part of those AFOSI manuals or instructions?

17 A. Almost always, yes, ma'am.

18 Q. And you mentioned OSI JA.

19 You never worked for OSI JA, did you?

20 A. No, ma'am, I did not.

21 Q. So it's fair to say you did not review all of AFOSI
22 Manual 71-121 during your time in the Air Force?

23 A. That's true, yes, ma'am.

24 Q. The first time you've ever read through that whole manual
25 was for this case?

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1 A. Yes, ma'am. In the last two years, since late December, I
2 believe, 2019, January 2020.

3 Q. You've never been an OSI agent?

4 A. That's correct, I have not.

5 Q. You've never attended the OSI training school; correct?

6 A. Only as adjunct faculty.

7 Q. Okay. And let's talk a little bit about your role.

8 You weren't part of the permanent faculty at FLETC, were
9 you?

10 A. No, ma'am. And this was actually at Bolling, before the
11 OSI Academy moved to the Federal Law Enforcement Training
12 Center in Brunswick.

13 Q. Okay. You'd go down there and teach a course on trial
14 skills; correct?

15 A. Yes, ma'am. I was adjunct faculty at Bolling Air Force
16 Base before they relocated for those years that I was as an
17 area defense counsel that you talked about before and as a
18 circuit defense counsel.

19 Q. So when you were teaching at -- the OSI agents, you were
20 there in your capacity as a defense counsel?

21 A. Yes, ma'am.

22 Q. So you weren't teaching them about their requirements for
23 submission of fingerprints?

24 A. That's right. I was not.

25 Q. In your OSI -- or in your military career, you never

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1 supervised OSI personnel?

2 A. No, ma'am, I did not supervise OSI personnel. I worked
3 with their DetCo and superintendent, but I did not directly
4 supervise them. We did provide guidance on case
5 investigations, but I did not supervise them.

6 Q. You were never part of a security forces squadron?

7 A. I was when I deployed to Iraq. I was part of the
8 820th Security Forces Group and the 822nd Security Forces
9 Squadron in 2013 when we went to Talil Air Base. So I
10 actually deployed as security forces.

11 Again, I was attached to them for the deployment, but my
12 role there was -- to be clear, was not as a law enforcement
13 person. I was the legal adviser to the staff judge advocate
14 for that deployment embedded with the 822nd Security Forces
15 Squadron and the 820th Security Forces Group. They were out
16 of Moody Air Force Base, Georgia. And we went to Talil in
17 Al Nasiriyah, Iraq, in 2003.

18 Q. But you were not a security forces --

19 A. I was not credentialed as a security forces law
20 enforcement officer, no, ma'am.

21 Q. Never attended any of the security forces training;
22 correct?

23 A. That's correct, yes, ma'am.

24 Q. Colonel Youngner, I want to go through some of what
25 plaintiffs' counsel went through with you on AFOSI

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1 Manual 71-121. Okay?

2 A. Yes, ma'am.

3 Q. Plaintiffs showed you -- and that's JEX 4.

4 A. Yes, ma'am.

5 Q. Go down to paragraph 4.24.1.3, page 51.

6 Okay. And so this is the paragraph that -- 424.1.3, the
7 case file.

8 This is the paragraph that plaintiffs' counsel is talking
9 to you about; correct?

10 A. Yes, ma'am. It was one of them.

11 Q. Okay. And this is talking about the monthly reviews;
12 correct?

13 A. Yes, ma'am.

14 Q. And at the bottom of that, it says, "The case agent and
15 supervisory or senior agent will ensure every case file is
16 reviewed monthly to ensure investigative sufficiency progress
17 and data integrity between the ROI and activity narrative and
18 note fields." Correct?

19 A. Yes, ma'am.

20 Q. I want to skip down to paragraph 4.24.4. It's on the same
21 page.

22 And it says, "Use the AFOSI investigative sufficiency
23 checklist at Attachment 7" --

24 Do you remember looking at Attachment 7 with plaintiffs'
25 counsel?

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1 A. Yes, ma'am, I do.

2 Q. -- "or a more comprehensive checklist, such as a region
3 case review checklist as a guide for reviews."

4 Do you see that language there, Colonel?

5 A. Yes, ma'am.

6 Q. Then it says in that highlighted portion, "Merely use it
7 as a guide for discussion during the review."

8 Do you see that, Colonel?

9 A. Yes, ma'am, I absolutely do.

10 Q. In your experience reviewing Air Force policies, is that
11 language mandatory to use Attachment 7?

12 A. Ma'am, it is not mandatory. It is telling the reader that
13 this is a guide. And the fact that they offer that or a more
14 comprehensive checklist -- you know, my understanding is the
15 Air Force offers a checklist because they really want you to
16 use it. Usually, we come up with a checklist when we've
17 identified a problem in the Air Force.

18 So to fix that problem, we now have a checklist for you to
19 follow. So a prudent person would use that checklist to make
20 sure they get it right. But it is not mandatory, to be more
21 precise to your question.

22 Q. So it would be within the discretion of the supervisor
23 whether or not to use Attachment 7; correct?

24 A. Per this section, yes, ma'am.

25 Q. Now, you talked about, with plaintiffs' counsel, weekly

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1 reviews; correct?

2 A. Monthly and weekly reviews, yes, ma'am.

3 Q. Can you point me to the portion of this manual or any
4 AFOSI regulation that requires a mandatory weekly review of
5 the file?

6 A. No, ma'am. I believe the only thing I could point to
7 would be monthly reviews. I do recall witnesses testifying
8 about weekly reviews, but I don't recall a point in this
9 manual that says anything other than monthly reviews once it's
10 been opened.

11 Q. So doing a weekly review would be at the discretion of the
12 supervisor?

13 A. Yes, ma'am. Or the case agent themselves, if they wanted to
14 be, you know, diligent.

15 Q. Now, I want to talk about -- I think you mentioned this
16 earlier when we were talking about you reviewing the
17 investigative sufficiency of the file. Can we move to that.

18 A. Yes, ma'am.

19 Q. As a judge advocate.

20 A. Now, you are talking about the Kelley file in particular?

21 Q. No, Colonel Youngner. I'm just talking about your
22 experience as a judge advocate reviewing with case agents the
23 legal sufficiency of the file.

24 A. Yes, ma'am.

25 Q. Okay. Now, when you're reviewing -- in your Air Force

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1 career, when you were reviewing the legal sufficiency of the
2 file, you can't ever remember asking agents if they had
3 submitted fingerprints, can you?

4 A. I cannot remember that, ma'am.

5 Q. You were just discussing with the agents what information
6 they would need to prove their case?

7 A. The focus was on the elements-of-proof worksheet, you
8 know, witnesses and evidence needed to prove that case. And
9 then if there were questions over rights advisements or
10 probable cause, we would discuss those.

11 Q. Sure. But nothing about fingerprints?

12 A. As I recall -- frankly, I remember the very first time I
13 went down to the det at Bolling and we had the folder. I
14 didn't know there was a thing called case notes, and they
15 explained that to me. And that very first time, I actually
16 saw a fingerprint card.

17 And that predates the NICS requirement, but -- so it was
18 kind of cool to me, as a young captain JAG, to see just what
19 all went into, frankly, the really hard work that a good OSI
20 agent does to put that file together. So I have seen them
21 before, coincidentally. But that didn't cause me, at that
22 stage of my career, as a captain, to say, "Oh, don't forget
23 about these fingerprints." And, frankly, timing-wise, that
24 was in the early 90's.

25 Q. Nor did you discuss fingerprint submission with security

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1 forces personnel; correct?

2 A. No, ma'am. That's correct.

3 Q. It's not something you would do with security forces?

4 A. As a staff judge advocate, no, unless there was some --
5 you know, if we had any -- so short answer is no. Unless
6 there was some reason to, no, there would not.

7 Q. Now, I want to talk a little bit about security forces'
8 responsibilities to submit final disposition reports. Okay?

9 A. Yes, ma'am.

10 Q. And you said this a couple of times when you were talking
11 to plaintiffs, and so I just want to clear this up.

12 A. Certainly.

13 Q. You were talking about investigative responsibility.

14 Do you remember that topic?

15 A. Generally, yes.

16 Q. Okay. And you said that, generally, one agency had
17 investigative responsibility for the case; correct?

18 A. Yes, I did.

19 Q. You've reviewed the Kelley case; correct?

20 A. Yes, I have.

21 Q. And you know that SF, security forces, did some
22 investigation on an alleged assault of Tessa Kelley; correct?

23 A. That's correct.

24 Q. And that investigation resulted in a letter of reprimand;
25 correct?

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1 A. I'm aware of that. That was from February 2012, if I'm
2 not mistaken.

3 Q. And a letter of reprimand is not a criminal action;
4 correct?

5 A. It's an administrative sanction. It's an unfavorable
6 information file matter.

7 Q. Not a criminal action?

8 A. No. It's to reflect the conduct. The conduct that
9 it's -- it's basically a censure, a reprimand. And it's based
10 on typically some type of either poor performance or
11 misconduct. So there was misconduct. There was a criminal
12 act. It's just it wasn't a sentence or a conviction. It was
13 simply an administrative sanction for the criminal act cited
14 in that -- and a very low-level slap on the wrist, if you
15 will, as how I would describe that. It's certainly not a
16 conviction.

17 Q. And then OSI did what you would characterize as a separate
18 investigation on domestic abuse concerning Tessa Kelley;
19 correct?

20 A. That predated it in June of 2011, prior to the security
21 forces doing their separate incident. So OSI took the
22 fingerprints in '11. The security forces did not take
23 fingerprints in February of '12 -- 2012.

24 Q. And I'm not talking about fingerprints.

25 I'm asking did OSI conduct its own separate investigation

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1 on domestic violence regarding Tessa Kelley?

2 A. Yes, ma'am.

3 Q. Okay. And that also included the allegation of the
4 assault on the stepson; correct?

5 A. Ultimately, it did. Yes, ma'am.

6 Q. And that investigation resulted in a court-martial;
7 correct?

8 A. That's correct.

9 Q. And that court-martial -- after that court-martial, there
10 was a final disposition report; correct?

11 A. Yes. There were two opportunities for final disposition
12 reports.

13 Q. Colonel Youngner, I'm not asking about opportunities.

14 All I'm asking is, at the end of that court-martial, there
15 is a result of trial that's a final disposition report;
16 correct?

17 A. There are -- is a report, a result of trial. And there
18 are two final disposition reports in the Kelley case.

19 Q. Okay. And on that report of result of trial, there's a
20 distribution list; correct?

21 A. That's correct.

22 Q. Ten entities on there, isn't there?

23 A. I'd have to count the number, but it sounds right.

24 Q. Not all of those entities have a requirement to submit
25 that report; correct?

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1 A. Yeah. The only two that have a requirement are the
2 security forces confinement facility supervisors and the OSI.
3 The rest of them do not have a requirement.

4 Q. And the only reason that security forces has the
5 responsibility is because there was confinement; correct?

6 A. That's correct. For AFI 31-, I believe it's 205.

7 Q. Okay. So they don't have an independent responsibility
8 just because the investigation of the assault of Tessa Kelley
9 resulted in a court-martial conviction; correct?

10 A. I disagree. They have an independent responsibility
11 through their own instruction, AFI 31-205, that requires them
12 to because of the confinement and the nature of the offenses
13 that led to that confinement being subject to punishment
14 beyond a year and domestic violence.

15 Q. But because of the confinement, security forces has --

16 A. Yes. Absolutely.

17 Q. Okay.

18 A. Absolutely.

19 Q. OSI has the responsibility because they were the lead
20 investigative agency; correct?

21 A. That's correct, yes, ma'am.

22 Q. Okay. So the reason that there's the responsibility to
23 submit that final disposition report -- it's two different
24 reasons; correct?

25 A. That's correct. Absolutely. Yes, ma'am.

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1 Q. Okay. So if security forces -- if Devin Kelley had not
2 been sentenced to confinement, hypothetically, after this
3 court-martial, he just got a bad conduct discharge, he had not
4 been sentenced to confinement, security forces wouldn't have
5 had a responsibility to submit the report; correct?

6 A. I believe you are correct there. The only question I have
7 on this case is, because he was in pretrial confinement, you
8 know, would there have -- I would have to go back and check
9 31-205 to see what is the criteria requiring submission when
10 someone is convicted but not sentenced to any more
11 confinement.

12 Because there could be a judge -- I've seen cases where
13 the pretrial confinement period was long enough to satisfy the
14 sentence to confinement, so to get a bad conduct discharge and
15 no additional time.

16 But back to your hypothetical, I could imagine -- and I
17 believe there could be a scenario where there wouldn't have
18 been an independent security forces requirement, but those
19 aren't the facts of this case. The facts of this case are
20 there was an independent requirement.

21 Q. Because of the confinement?

22 A. Yes, ma'am.

23 Q. Okay. Not because security forces had investigated some
24 abuse of Tessa Kelley that resulted in an IOR?

25 A. No. The issue with security forces had to deal with

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1 fingerprints as the second prong. And I'll leave that to
2 y'all to -- let me stop there. Yes, ma'am.

3 Q. Okay. Now, you talked a little bit about -- while we're
4 on the subject of security forces -- the DODIG report that
5 indicated that security forces only had a 64 percent
6 completion rate or submission of final disposition reports;
7 correct?

8 Do you remember talking about the DODIG report, JEX 1,
9 with plaintiffs' counsel?

10 MR. ALSAFFAR: Objection, Your Honor. It's just --
11 counsel is misstating the evidence. It's 60 percent failure
12 rate, not compliance rate in that report.

13 THE COURT: You can clean that up.

14 Go ahead.

15 BY MS. CHRISTILLES:

16 Q. Colonel Youngner, do you remember talking about the
17 compliance rate of security forces, as referenced in that
18 DODIG report?

19 A. Yes, ma'am, I do remember that. I think it was the 2017
20 report.

21 Q. Sure. Do you remember what OSI's compliance rate was in
22 that report?

23 A. It was much higher. They had about a 88, an 87-or-so
24 percent compliance. They were missing 12 or 13 percent.

25 So the aggregate for the Air Force was what you had, the

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1 high 60 percent number for too, but that was mainly because of
2 security forces.

3 Q. So if we look at JEX 1 at page 31.

4 I won't make you guess on what that compliance rate was.
5 Just take a look.

6 A. Okay.

7 Q. So, Colonel Youngner, if you look at the bottom of that
8 document, which is part of JEX 1 which plaintiffs' counsel
9 showed you.

10 A. Right.

11 Q. It looks like a 93.86 percent success rate for
12 fingerprints and 93.48 percent success rate for final
13 dispositions; correct?

14 A. Yes, that's correct.

15 Q. Okay. Let's talk a little bit about the evidence you did
16 review for this Kelley case -- or for the Kelley case.

17 Okay, Colonel Youngner?

18 A. Certainly. Yes, ma'am.

19 Q. Okay. Sorry. Plaintiffs' counsel was getting up, and I
20 thought he was going to object to me.

21 MR. ALSAFFAR: Sorry. I'm just grabbing a binder.

22 BY MS. CHRISTILLES:

23 Q. All right. I want to go back to what plaintiffs' counsel
24 talked to you about.

25 They talked to you about information that was in a barment

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1 letter; correct?

2 A. Yes, ma'am. The recommendation and then two days later --
3 I think it was the 29th of March '13, the barment letter, the
4 actual order.

5 Q. And it talked about in there some alleged threats to
6 leadership; correct?

7 A. Yes, ma'am.

8 Q. And I think that you indicated that there were four
9 instances of threats to leadership?

10 A. Well, there were -- I think the question, as I recall,
11 included threats known by leadership. Some were to leadership
12 and some were to a former supervisor. The last one I recall
13 was communicated Master Sergeant Bizzack, and it was after
14 Kelley had separated.

15 But on the barment letter, there were threats
16 communicated, I believe, to -- so, yes, to answer your
17 question, there were probably three, I think, while he was
18 still on active duty that were known at the time of that
19 barment letter, to the best of my recollection.

20 Q. He told his wife, correct, that he -- if he had a shotgun,
21 he would shoot his leadership, allegedly?

22 A. Yes.

23 Q. And at the time, that was Tessa Kelley, correct?

24 A. That's correct, yes, ma'am.

25 Q. So that was a communication to his wife?

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1 A. Yes, ma'am, that's correct.

2 Q. Okay.

3 A. And I don't know if she then communicated that to -- or
4 when she would have passed that on to the OSI agents, I
5 believe, in the case.

6 Q. And then you referenced some alleged threats to Master
7 Sergeant Bizzack; is that correct?

8 A. Well, it was passed on to Sergeant Master Bizzack. I'm
9 trying to remember if it was Ms. Rowe. But it was another --
10 it was a supervisor who then passed that on. There was also,
11 I believe, a Sergeant Edwards who he may have discussed some
12 concerns with.

13 But, again, I'm trying to keep the date -- I'd have to go
14 back and review my report or other matters to find those
15 specific instances.

16 And then I don't know what was communicated out of Peak to
17 the leadership, but the letter -- the barment letter that you
18 oriented me to cited the nature of the threats, and I'm trying
19 to recall what I reviewed.

20 Those seem to stick out in my mind, those three.

21 Q. Okay. Well, let's take a look at the statement of
22 Ms. Rowe that she made after the shooting, and that's JEX 511.

23 I'm just trying to get up here so we can blow it up for
24 you.

25 A. Yes, ma'am.

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1 MS. CHRISTILLES: It's the second paragraph there.

2 BY MS. CHRISTILLES:

3 Q. Ms. Rowe says she first meets Kelley in 2010. Upon
4 meeting Kelley, she immediately thought he was odd and even
5 told co-workers they needed to keep an eye on him because he's
6 the type of guy who will come to shoot us.

7 Do you remember viewing that statement?

8 A. I do, yes, ma'am.

9 Q. Did you review any statements from Ms. Rowe in the OSI
10 investigative report?

11 A. I'd have to -- I'd have to go back and look at that. I
12 just don't recall. So I don't recall. I may have, but this
13 may -- I just -- I'm not certain. So since I'm not certain, I
14 can't confirm that I did.

15 Q. So Ms. Rowe opines after the shooting -- or states to
16 investigators after the shooting -- and I can pull up the date
17 on this, if you'd like.

18 But she tells investigators after the shooting that she
19 told co-workers they needed to keep an eye on him because he's
20 the type of guy who will come shoot us; correct?

21 A. That's correct. So before the shooting, while he was on
22 active duty, she informed co-workers of this concern. But
23 there was no evidence of her, that I'm aware of, filing a --
24 you know, she didn't go report it to OSI or to security forces
25 but, she did alert her co-workers.

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1 Q. And it was because she had a feeling; correct?

2 A. That's what she said, yes, ma'am.

3 Q. No actual threat from Mr. Kelley -- from Devin Kelley?

4 A. At that point, no, ma'am.

5 Q. Okay. Any threatening messages to Ms. Rowe were well
6 after Devin Kelley had left the Air Force; correct?

7 A. I believe so. Yeah, she --

8 Q. Well --

9 A. I'm sorry. Please.

10 Q. No. Go ahead.

11 A. I don't want to speculate again or try to -- I don't want
12 to confuse Rowe and Edwards and who deserves a dirt ending or
13 something like that, words to that effect. So I think it's in
14 the record and --

15 Q. Well, we can look down at Ms. Rowe's statement, those last
16 couple of paragraphs.

17 A. Right.

18 Q. It indicates, in May of 2017, Rowe received a second
19 Facebook message from Kelley.

20 That would have been after Devin Kelley had left the
21 Air Force; correct?

22 A. Right. And I guess there were -- and above that is some
23 concerns communicated to Bizzack as well. So yes, ma'am.

24 Q. And you talk about Master Sergeant Bizzack as well.

25 Let's look at JEX 517.

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1 And according to Master Sergeant Bizzack, he had a gut
2 feeling that if there were ever going to be someone who would
3 shoot up the shop, it would be him?

4 A. Yes, ma'am.

5 Q. Stating there was something that was off about him;
6 correct?

7 A. That's -- yes, ma'am, that's right.

8 Q. And this was in a statement that he gave to investigators
9 after the shooting; correct?

10 A. That's correct, ma'am. Any actions he would have taken at
11 the time would have been in the PIF, the personnel information
12 file. And that's a separate document that OSI did have as
13 part of their investigation.

14 And that covers, like you mentioned, that letter of
15 reprimand from before. There are other lists of actions taken
16 to reflect the misconduct of Devin Kelley, at least prior to
17 the court-martial in that PIF.

18 Q. That's right. Actually, Ms. Rowe gave Devin Kelley
19 multiple letters of counseling and multiple letters of
20 reprimand; correct?

21 A. There were unfavorable information letters throughout
22 that, along with letters from more senior leaders within the
23 squadron.

24 Q. You wouldn't consider an administrative action as a
25 positive thing for an airman, would you?

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1 A. Oh, those are not -- those are adverse administrative
2 actions. There are positive ones. But most everything -- I
3 don't recall seeing any positive administrative action on the
4 two pages of the PIF for Airman Basic Devin Kelley when I
5 reviewed it. And there were multiple -- anyway, I hope that
6 answers your question.

7 Q. So it's fair to say that Ms. Rowe took some unfavorable
8 actions against Kelley while he was in the Air Force; correct?

9 A. Yes, she did.

10 Q. And you did mention Jessika Edwards; right?

11 A. I did.

12 Q. Now, any statements made to Jessika Edwards were after she
13 had left the Air Force; correct?

14 A. As I recall, yes, ma'am.

15 Q. Okay. So those wouldn't have been known to an Air Force
16 employee; correct?

17 A. I don't believe so, unless she communicated it. And so it
18 would not.

19 Q. Okay. You didn't see any evidence in your review of the
20 file that Jessika Edwards communicated those things to anyone
21 in the Air Force, did you?

22 A. I did not, that I can recall. I believe she did not.

23 Q. When reviewing the file, do you recall any firsthand
24 statements from anyone where Devin Kelley threatened to shoot
25 them or shoot up the squadron?

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1 A. The -- Tessa Kelley is the immediate one that comes to
2 mind. And beyond that, I don't believe that his research at
3 Peak was communicating a threat. So that would be the --
4 right now, the direct communication was to his wife, Tessa
5 Kelley.

6 Q. Now, you talked a little bit with plaintiffs' counsel
7 about some of the things in the OSI file regarding sexual
8 assaults; correct?

9 A. Yes, they were reviewed by counsel.

10 Q. Colonel Youngner, you haven't done any independent
11 research on whether or not sexual assault would lead to a mass
12 shooting, have you?

13 A. I have not done that type of research.

14 MS. CHRISTILLES: Your Honor, may I have five
15 minutes?

16 THE COURT: Yes. So while we're on break -- and I'm
17 not sure if this is going to influence you asking more
18 questions -- but I'm now, frankly, confused.

19 You've asked a number of questions suggesting that
20 there was no evidence before the Air Force. And I'm wondering
21 then if there was no evidence, pursuant to your argument, how
22 was it that the Air Force is writing on March 27th, 2013, that
23 he's got severe mental health problems, violent and dangerous
24 behavior, and well-documented history of making threats?

25 The commander issues that order on March 29th, giving

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1 an order of expulsion and ordering him not to enter the base.
2 And then on April 26th, a year earlier, the Air Force's
3 assessment, which OSI is present for, gives him all those
4 ratings on his rage and violence score.

5 So I'm, frankly, confused about the argument of
6 there's no evidence before the Air Force.

7 And then the other question I'm wondering about is,
8 if I understand your argument right, you're saying that the
9 only entity that had an obligation to forward the final
10 determination report was the 49th Squadron because they were
11 in charge of the brig.

12 Is that your argument?

13 MS. CHRISTILLES: No, Your Honor. And I was trying
14 to clean that up a little bit, because I think it got
15 confused.

16 THE COURT: So I am confused, just to let you know.

17 MS. CHRISTILLES: Sure.

18 THE COURT: So I need you to clean up for me -- what
19 is your argument? Who had the -- from your perspective, I
20 think I'm hearing sole responsibility. So I need that cleaned
21 up.

22 And then the last point I'm confused about was, so
23 somewhere in this -- and I was looking for it, and I can't
24 find it now -- I thought there was a requirement by either the
25 49th or the OSI that, upon probable cause, they should have

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1 issued the fingerprint -- forwarded the fingerprints.

2 And so, I mean, based upon all these requests for
3 expulsion and the commander's order not to enter, I mean,
4 wasn't that probable cause?

5 MS. CHRISTILLES: Your Honor, if I may.

6 THE COURT: Yeah.

7 MS. CHRISTILLES: I'm going to start with what I
8 think is the easiest one: the final disposition after
9 court-martial.

10 OSI did have a requirement to submit the final
11 disposition. It was based on the fact that they were the
12 investigative agency handling that case.

13 Because Devin Kelley was also sentenced to
14 confinement, we have stipulated that security forces also had
15 a duty because of the confinement. But security forces didn't
16 also have a duty because they had investigated him. And I
17 think that -- and it may be my confusion with what I hear
18 plaintiffs saying, but what I thought I heard plaintiffs
19 arguing was that OSI had a duty to send it in because they
20 were the investigative agency, but so did security forces.

21 And, Your Honor, I think Colonel Youngner has cleared
22 that up for us. That's not true.

23 OSI had to submit it because they were the
24 investigative agency. Security forces had to submit it simply
25 because they were the confinement facility.

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1 THE COURT: And didn't security forces, though, also
2 have a requirement to submit the fingerprint card earlier?

3 MS. CHRISTILLES: And, sir, I can -- Your Honor, I
4 can cover that, if you would like. It's separate from the
5 final disposition report.

6 THE COURT: Right. And I understand that.

7 MS. CHRISTILLES: The final disposition report is
8 actually what results in the denial. The probable cause
9 fingerprint submission will not result in a denial, which is
10 what I think --

11 THE COURT: But won't it result in a delay?

12 MS. CHRISTILLES: It may, Your Honor. It may.

13 THE COURT: Okay. Thank you for putting me back on
14 track because I was losing sight of the argument.

15 Okay. Let's -- well, it's 4:34. How much more do
16 you have with him?

17 MS. CHRISTILLES: If we could take five minutes, I
18 can give you an accurate assessment, Your Honor.

19 THE COURT: Okay. Let's take five.

20 (Recess.)

21 THE COURT: Do you have other questions?

22 MS. CHRISTILLES: I just have a couple, Your Honor.

23 But before we proceed, I just -- one more thing on
24 the security forces thing. There's been testimony about these
25 missed opportunities, and one of those was security forces

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1 collecting the fingerprints in February, which is what Your
2 Honor was alluding to.

3 It's the government's position that for purposes of
4 proximate cause, that couldn't have been the proximate cause
5 because it would have never resulted in a denial. And so
6 that's why the --

7 THE COURT: I thought I'd just give you advance
8 warning of a question I have. It could have potentially
9 resulted in a delay. And so the delay could have potentially
10 put the FBI on notice that, hey, maybe we need to check
11 further. And they could have found the conviction.

12 I mean, that's one potential route that this could
13 have led to; right?

14 MS. CHRISTILLES: Except that, Your Honor --

15 THE COURT: And so I don't mean to engage in argument
16 right now.

17 MS. CHRISTILLES: Sure.

18 THE COURT: I just want to give you fair warning
19 about what's popping into my head so you all can be prepared
20 to respond to it.

21 MS. CHRISTILLES: Yes, Your Honor. And we can more
22 fully brief on once it goes in as probable cause and then
23 there's no final disposition, what happens to it.

24 THE COURT: And I generally -- I would never do this
25 in front of a jury. But since this is just a bench trial, as

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1 questions arise, I'm going to give both sides fair notice
2 about what questions are going through my mind.

3 MS. CHRISTILLES: Yes, your Honor.

4 MR. ALSAFFAR: Appreciate it.

5 MS. CHRISTILLES: That may be more appropriately
6 briefed or handled with a different witness. I don't think
7 that Colonel Youngner is qualified to answer that.

8 MR. JACOB: And Your Honor, just to be clear, we
9 disagree with that assessment.

10 THE COURT: I knew you would.

11 MR. JACOB: Yeah.

12 THE COURT: Anything further for Colonel Youngner?

13 MS. CHRISTILLES: I do just have a couple more
14 questions, Your Honor.

15 THE COURT: Go ahead.

16 BY MS. CHRISTILLES:

17 Q. Colonel Youngner, we were talking about -- or, actually,
18 you were talked about plaintiffs about the case agents
19 touching the file; correct? Do you remember that?

20 A. I do recall that, yes.

21 Q. And they showed you an Excel spreadsheet with a bunch of
22 different lines on it, and it would say "locked" or "opened."
23 Correct?

24 A. There were two of those, yes. It was JEX 348 and JEX 349.
25 Yes, ma'am.

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1 Q. That would have been the electronic file that they were
2 closing and opening; correct?

3 A. That's correct, yes, ma'am.

4 Q. And the fingerprints for Devin Kelley were hard copy;
5 correct?

6 A. Those fingerprints were hard copy, and -- but, you know --
7 yes, ma'am, to answer your question.

8 Q. So they wouldn't have been in the electronic file;
9 correct?

10 A. The fingerprints would not have been in the electronic
11 file.

12 Q. Okay. And you aren't aware of any regulation that
13 requires a case agent, every time they touch a file
14 electronically, to verify that hard-copy fingerprints have
15 been submitted; correct?

16 A. Every time they do it, that would not be a requirement,
17 only when they are running the two checklists, which, you
18 know, you could do IDP -- excuse me, an internal data page
19 note or -- about what you've accomplished or you could do an
20 I2MS entry as well.

21 Anyway, I'll just leave it at that.

22 Q. And there is no requirement that makes it mandatory for a
23 supervisor to, every time they electronically touch that file,
24 to determine that the fingerprints have been submitted?

25 A. No. It's just an opportunity. It's not a requirement.

LARRY YOUNGNER - REDIRECT

1 It's an opportunity.

2 Q. It's an opportunity? Nothing mandatory?

3 A. The only -- again, it's -- there's nothing mandatory in
4 making an electronic note that requires checking for
5 fingerprints or FDR every time, that's correct.

6 MS. CHRISTILLES: I'll pass the witness, Your Honor.

7 THE COURT: Any redirect?

8 MR. ALSAFFAR: Very brief, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. ALSAFFAR:

11 Q. On that last point, Colonel Youngner, that the
12 U.S. attorney was asking you about, there's -- the agents and
13 the supervisor is required to document electronically whether
14 they submitted the fingerprints or conviction when it's a
15 qualifying offense; is that correct?

16 A. So I'm going to ask you, sir -- I'm sorry. I'm having a
17 little trouble hearing you.

18 Q. I didn't have my mic on. That's my fault.

19 A. Okay.

20 Q. Responding to what the U.S. attorney just said, the
21 supervisory agents and the case agents are required to
22 electronically -- in the electronic file, document their
23 submission of fingerprints and convictions when it's a
24 qualifying offense.

25 That's required to be put into the electronic file, isn't

LARRY YOUNGNER - REDIRECT

1 it?

2 A. Ultimately, there is a requirement to note that, and
3 that's a separate question than what defense counsel had
4 asked.

5 So, yes, sir, there is an electronic requirement, but --
6 to be clear on both. So there's a requirement to note that.
7 And then whether there's a requirement to look at it each
8 time, no, there's an opportunity to correct your problems each
9 time.

10 Q. And that mandatory instruction that talks about the
11 mandatory monthly reviews, that's Section 71-121 -- and I
12 believe that's Section 4.24.1.3 -- let me pull it up for you.

13 It's Joint Exhibit Number 4, page 51, real quickly.

14 When the U.S. attorney was asking you these questions, she
15 didn't show you this part of that mandatory section that dealt
16 with the monthly case reviews, so I want to show it to you.

17 Just give us a second. It's Joint Exhibit 4 and page 51.
18 It's just not showing on the screen. That's all. That's
19 okay. That's all right.

20 If we could just narrow it on 4.24.1.3, the case file
21 review, page 51. That's JX 5. You've just got the wrong
22 number up. It's JX 4. It's Joint Exhibit 4, page 51. There
23 you go. Thank you. That's okay.

24 What is one of the -- if you look at "for example," what
25 is one of the examples the mandatory instruction is showing

LARRY YOUNGNER - REDIRECT

1 relating to these mandatory monthly reviews?

2 A. This references the final disposition report Form R-84.

3 Q. Okay. And you were asked about this -- the checklist.

4 The checklist isn't mandatory rule; the mandatory rule is
5 the actual rule.

6 Does that make sense?

7 A. In other words, the mandatory rule is what's required to
8 be submitted. The checklist is a tool to make sure you comply
9 with that.

10 In fact, OSI developed a checklist, in part, in response
11 to the DODIG reports. That was in one of the reports. It
12 made it clear that, "Hey, we're just getting ahead of this.
13 We're going to fix it." And OSI demonstrated some success,
14 though -- anyway, I'll just leave it at that.

15 Q. Right. After the -- in the 2017 report.

16 But what I want to ask you about regarding that checklist
17 part that you were asked about on cross-examination is -- is
18 that -- well, first of all, just to be clear, the checklist
19 actually has the required submission fingerprints and
20 convictions; right? It's on the checklist; right?

21 A. Those are on the checklist; in fact, in a couple places on
22 one of them.

23 Q. Well, let's just assume this. Let's assume it wasn't on
24 the checklist. And the checklist is just a guide anyway. And
25 let's just assume they just forgot to put it on the checklist.

LARRY YOUNGNER - REDIRECT

1 Would that absolve the Air Force of the mandatory
2 instruction that says you still have to submit fingerprints
3 and convictions?

4 A. No. There was still the requirement.

5 Q. Okay. The U.S. attorney had asked you and showed you
6 about the Air Force, in 2017, sort of finally getting up to
7 speed and having a better success rate on this issue that had
8 plagued it for 30 years, the compliance rate -- or at least on
9 the OSI side. Not on the security forces side, but the OSI
10 side.

11 Do you remember that?

12 A. That's correct.

13 Q. All right. And I want to show you plaintiffs' -- I'm
14 sorry not plaintiffs' exhibit -- Joint Exhibit 433. Start
15 with page 1.

16 The Air Force actually conducted a review of what the
17 consequences were of their failures over that time period,
18 1998 through present; correct?

19 THE COURT: One second.

20 THE WITNESS: That's correct.

21 MS. CHRISTILLES: Your Honor, objection. That's
22 outside the scope of cross-examination.

23 THE COURT: Sustained.

24 MR. ALSAFFAR: Okay.

25 Can we show Joint Exhibit 173, page 1 and 2. It's

LARRY YOUNGNER - REDIRECT

1 just a two-page document.

2 BY MR. ALSAFFAR:

3 Q. And do you remember when Ms. Christilles was asking you
4 about Ms. Rowe, and she was showing you another statement from
5 the FBI summary of her statement from the FBI?

6 Do you remember that?

7 A. I do recall that, yes.

8 Q. I'm showing you Joint Exhibit 173.

9 Can I see where the highlights are? Thank you.

10 I'm showing you Joint Exhibit 173, which was -- this was
11 the one you were referring to with the U.S. attorney when you
12 were talking about what you reviewed for your report; correct?

13 A. Right. This was one of the documents that was also
14 referenced in the personnel information file of Airman Kelley
15 when he was in the Air Force.

16 Q. And this was actually the Department of Defense's
17 investigation interview with Ms. Rowe; right?

18 A. Yes. That's my understanding.

19 Q. And I'm showing you -- under the paragraph "interview," if
20 you can highlight that for the colonel.

21 This is where Ms. Rowe states that she was the supervisor
22 in 2010.

23 Do you see that?

24 A. Yes.

25 Q. And then little bit down, she says, "After that point" --

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1 so when she was supervising Mr. Kelley, she began to observe
2 behavior issues with him or red flags.

3 Do you see that?

4 A. I do.

5 Q. And so she's reporting -- is she reporting these red flags
6 that she was noticing while she was supervising him prior to
7 his release from the Air Force?

8 A. Right. And those are the -- so this document wasn't in
9 the PIF, to be clear about what I said before. But the
10 actions she took about it were reflected in that personnel
11 information file.

12 Q. And a little further down, she states her uneasiness
13 regarding Devin Kelley resulted in her telling her supervisor,
14 Master Sergeant Troy Bizzack, "We need to watch this guy
15 because he's the kind of person who will come and shoot
16 everybody"?

17 A. Yes.

18 Q. Okay. And so she was --

19 A. That's what she said.

20 Q. And then if you go a little bit down on page 2, just the
21 next page, the top paragraph starting with "Rowe said." This
22 is Ms. Rowe reporting about her time in the Air Force when
23 Devin Kelley there was.

24 She stated -- Rowe said that "All of the supervisors in
25 her shop were concerned that Kelley had firearms. This

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1 included the unit secretary, Master Sergeant Bizzack, Sergeant
2 Lindemann, and Captain Elizabeth Nugent."

3 Do you see that?

4 A. I do see that, yes.

5 Q. Those are multiple service supervisors she was reporting
6 to while she was in the Air Force prior to the shooting;
7 correct?

8 A. That's correct.

9 MR. ALSAFFAR: Pass the witness, Your Honor.

10 THE COURT: Anything else?

11 RECROSS-EXAMINATION

12 BY MS. CHRISTILLES:

13 Q. Just to clarify a couple of those with Ms. Rowe's
14 statements.

15 Plaintiffs' counsel asked you about actions in the PIFs
16 with regard to the red flags.

17 Do you remember that question?

18 A. Yes, ma'am. However, I'm having a little more trouble
19 hearing you as well.

20 Q. That's because Mr. Alsaffar and I don't know how to turn
21 our microphones on.

22 THE COURT: You're going to be speaking out of this
23 microphone, so if you'll just pull this one.

24 MS. CHRISTILLES: Yes, Your Honor. I didn't have it
25 on, which might be the problem.

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1 BY MS. CHRISTILLES:

2 Q. You hear me now, Colonel Youngner?

3 A. I can, yes, ma'am.

4 Q. Great.

5 Mr. Alsaffar had asked you about actions in the PIF with
6 regard to the red flags; correct?

7 A. In general, yes, regarding Ms. Rowe.

8 Q. You don't remember seeing anything in the PIF about
9 actions taken because Devin Kelley had threatened to shoot his
10 supervisors; correct?

11 A. I don't recall direct threats to supervisors. I can't
12 remember if there were -- there may have been an entry after
13 the Peak incident where he was researching some matters there.

14 So -- but, again, the researching body armor and tactics,
15 techniques, procedures that may have been one entry in the
16 PIF. But the threat that he made -- or communicated to his
17 wife and the concerns that Ms. Rowe had, I did not see those
18 reflected in a letter of reprimand or admonishment or
19 counseling or in the high-risk violence response teams. And
20 then there were a couple other areas entered.

21 So, no, I don't recall that specifically.

22 MS. CHRISTILLES: Nothing further, Your Honor.

23 THE COURT: Anything else?

24 MR. ALSAFFAR: No, Your Honor.

25 THE COURT: Can this witness be excused?

1 MR. ALSAFFAR: Yes, Your Honor.

2 MS. CHRISTILLES: Yes, Your Honor.

3 THE COURT: Thank you, Colonel Youngner.

4 THE WITNESS: Yes, Your Honor. Thank you, sir.

5 THE COURT: So we will resume at 9:00. Thank you for
6 keeping us to the schedule, and so we are on schedule. We'll
7 resume at 9:00 with the next set of witnesses by Zoom.

8 I hope I don't jinx us by saying this, but I've been
9 asked to be part of a judge presentation to speak to federal
10 and state judges about what technology is working and not
11 working. Knock on wood, this seems to be working.

12 MR. ALSAFFAR: Except for the mic buttons.

13 THE COURT: So the request is — and I guess it's of
14 your IT guy, along with Daniel — can you all provide me a
15 short summary of what equipment we have in here?

16 MR. ALSAFFAR: Yeah.

17 THE COURT: So I know what to pass on to my
18 colleagues, saying what equipment seems to be working.

19 I just need a couple of pages. I don't need
20 paragraphs of that too. What the make and model of your
21 camera is and all of that. That's what I'm sort of looking
22 for. I don't know if that's your equipment, or is this the
23 court equipment? This is not my courtroom, usually.

24 MR. ALSAFFAR: That's the court's.

25 THE COURT: It's the court's?

1 So you might want to talk to Daniel about how does he
2 hook that up to Zoom. I'd probably need an explanation of
3 that.

4 MR. ALSAFFAR: Be glad to.

5 THE COURT: And so thank you.

6 MR. ALSAFFAR: Judge, when do you need it by?

7 THE COURT: Oh, two weeks. I mean, I'm just -- so
8 it's a thought that hit me. I've been invited to the program.
9 And so all of a sudden, I thought let me make the request as
10 I'm thinking about this.

11 MR. ALSAFFAR: Will do.

12 THE COURT: Anything else we need to take up before
13 we adjourn for today?

14 MR. ALSAFFAR: I don't have anything.

15 Paul, are you good?

16 MR. STERN: Good.

17 MR. ALSAFFAR: Okay.

18 THE COURT: You're welcome to leave your stuff here.
19 This courtroom will be locked up. Or you can take what you
20 want to take.

21 We're adjourned.

22 MR. ALSAFFAR: Thank you, Your Honor.

23 (Proceedings continued in progress.)
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2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled matter. I
4 further certify that the transcript fees and format comply
5 with those prescribed by the Court and the Judicial Conference
6 of the United States.

7
8 Date: 04/09/2021

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11
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